Page

Okla. Stat. Ann., tit. 5, ch. 1, app. 4, Code of Jud. Conduct, Canon 5C(2) (West 2001 & Supp. 2005) 14

Or. Const. art. VII, § 8 22

Or. Code of Jud. Conduct (2005):
  R. 4-102(C) 17
  R. 4-102(D) 14

Pa. Const. art. 5, § 18 22

Pa. Cons. Stat. Ann. § 1722(a)(2) (West 2004) 22

Pa. Cons. Stat. Ann., Code of Jud. Conduct, Canon 7B(2) (West Supp. 2005) 14

R.I. Const. art. 3, § 8 22

S.D. Codified Laws, ch. 12-16, app., Code of Jud. Conduct (Lexis Nexis 2005):
  Canon 5C(1) 17
  Canon 5C(2) 14

Tenn. Rules of Court, S. Ct. R. 10, Code of Jud. Conduct, Canon 5C(2) 14

Tex. Const. art. 5, § 1-a 22

Utah Code of Jud. Admin., ch. 12, Code of Jud. Conduct, Canon 5C(2) (Lexis Nexis 2001) 14

Va. Stat. § 54.1-3909 22

4 Vt. Stat. § 3 22

Wash. Const. art. IV, § 31 22

Wash. Ct. Rules, Code of Jud. Conduct (West 2000)
  Canon 7(A)(1) 17
  Canon 7(B)(2) 14

Page

W. Va. Const. art. 8, § 18 22

W. Va. Code Ann., State Court Rules, Code of Jud. Conduct, Canon 5C(2) (Lexis Nexis 2004) 14

Wis. Code Ann. ch. 60, S. Ct. R. 60.06(4) (West 2004) 14, 17

Wyo. Const. art 5, § 6 22

Wyo. Court Rules Ann., Code of Jud. Conduct, Canon 5C(2) (Lexis Nexis 2005) 14

MISCELLANEOUS

L. Berkson, *Judicial Selection in the United States*, in *Guide to Political Campaigns in America* 398 (P. Herrnson, ed. 2005) 1

E. Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent L. Rev. 133 (1998) 21

Code of Conduct for United States Judges, Canon 7 28

Fed. Code of Conduct for Jud. Employees, Canon 5 28

Frontline: Justice for Sale (PBS television broadcast Nov. 23, 1999) (transcript avail. http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html) 16

K. Hall, *Progressive Reform and the Decline of Democratic Accountability: Popular Election of State Supreme Court Justices*, 1850-1920, 1984 Am. Bar Found. Research J. 345 2

TABLE OF AUTHORITIES—Continued

	Page
K. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 1846-1860, 45 Historian 337 (1983)	2
W. Hall & L. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 Judicature 340 (1987)	21
Nat'l Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999)	16
C. Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190 (1993)	2
R. Salokar, *After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 Just. Sys. J. 149 (2005)	24
C. Solida, *The Two Sides of Merit Selection*, Ind. Lawyer, Sept. 16, 1998	19
D. Shrager & E. Frost, *The Quotable Lawyer* 34 (1986)	16

PETITION FOR A WRIT OF CERTIORARI

Martha Holton Dimick, Chairperson of the Minnesota Board on Judicial Standards, Kent A. Gernander, Chair of the Minnesota Lawyers Professional Responsibility Board, and Kenneth L. Jorgensen, Director of the Minnesota Office of Lawyers Professional Responsibility, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App., *infra*, 1a-86a) is reported at 416 F.3d 738 (8th Cir. 2005). The panel opinion (App., *infra*, 88a-122a) is reported at 361 F.3d 1035 (2004). This Court's earlier decision (App., *infra*, 123a-180a) is reported at 536 U.S. 765 (2002). The court of appeals' first decision (App., *infra*, 183a-272a) is reported at 247 F.3d 854 (2001). The district court's opinion (App., *infra*, 273a-307a) is reported at 63 F. Supp. 2d 967 (1999).

JURISDICTION

The court of appeals sitting *en banc* entered its judgment on August 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and Minnesota's Code of Judicial Conduct are set forth in the Appendix at App., *infra*, 323a-327a.

STATEMENT OF THE CASE

I. Background

For more than 150 years, most States have selected some or all of their judges by popular election. For a brief period early in this Nation's history, most state judges were appointed by the governor or the legislature. L. Berkson, *Judicial Selection in the United States*, in *Guide to Political Campaigns in America* 398-399 & n.1 (P. Herrnson, ed.

2005); C. Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 190 (1993). But the public rapidly came to believe that "governors and legislatures had distributed judgeships on the basis of 'service to the party' rather than on the 'legal skills or judicial temperament' of appointees," and reformers concluded that popular election provided the best opportunity to secure judges who served the law, rather than a patron. K. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 Historian 337, 347 (1983); Nelson, *supra*, at 194. At state constitutional conventions, "[d]elegate after delegate argued that the appointive system left far more room for the play of partisan politics than the elective system." K. Hall, *Progressive Reform and the Decline of Democratic Accountability: Popular Election of State Supreme Court Justices, 1850-1920*, 1984 Am. Bar Found. Research J. 345, 346-47. As a result, by the eve of the Civil War, most States had embraced popular elections as the best means of selecting their judges. Nelson, *supra*, at 190.

Concerns about political influence—and the corresponding need to preserve both the fact and appearance of an impartial judiciary—resurfaced again by the 1870s. Even in States with elected judiciaries, the public became concerned that "judges were almost invariably selected by political machines and controlled by them." Berkson, *supra*, at 398. Since then, States have implemented reforms to combat those problems. Chief among them is the adoption of nonpartisan elections for judicial positions, often coupled with regulation of judicial candidates' partisan activities. *Ibid.* In addition, to redress the potentially corrupting influence of money, many States have barred judicial candidates from personally soliciting campaign contributions. See p. 13-14 n.5, *infra*. This case concerns Minnesota's efforts to protect the impartiality of, and ensure public faith in, its elected judiciary through such measures.

II. Proceedings In This Case

Minnesota has provided for the election of judges since it joined the Union in 1858. Minn. Const. art. VI, § 7. In 1912, the Minnesota legislature joined other States in "decree-[ing] that elections for judicial office be nonpartisan." *Peterson* v. *Stafford*, 490 N.W.2d 418, 422 (Minn. 1992). Like the highest courts of other States, Minnesota's Supreme Court has adopted a Code of Judicial Conduct (based on the ABA's Model Code) that seeks to redress the impact of partisan politics and campaign contributions on judicial impartiality. App., *infra*, 275a-276a.

A. The Lawsuit

Respondent Gregory Wersal—twice an unsuccessful candidate for the Minnesota Supreme Court—filed this suit in 1998 challenging three provisions of Minnesota's Code of Judicial Conduct.[1] Two of those provisions remain at issue.

The "solicitation clause," bars judicial candidates from personally soliciting campaign contributions from potential donors. It provides in relevant part:

> A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept cam-

---

[1] Wersal was joined by members of his family, his campaign committee, the Minnesota Republican Party, and the other respondents. Petitioners are the Chairs of the Minnesota Lawyers Professional Responsibility Board and the Minnesota Board on Judicial Standards, as well as the Director of the Minnesota Office of Lawyers Professional Responsibility. By statute and rule, the Minnesota Lawyers Professional Responsibility Board and the Minnesota Board on Judicial Standards are responsible for enforcing Minnesota's Code on Judicial Conduct against lawyers and sitting judges, respectively. See 52 Minn. Stat. Ann., Rules on Lawyers Prof'l Responsibility, Rule 4; 52 Minn. Stat. Ann., Board on Jud. Standards, Rule 2; Minn. Stat. Ann. §§ 490.15, 490.16 & 490.18 (West 2002).

> paign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. * * * Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.

52 Minn. Stat., Code of Jud. Cond., Canon 5B(2) (West 2005). Respondents challenged that clause to the extent it prohibited judicial candidates from personally soliciting contributions from "large" groups or from signing letters seeking contributions. App., *infra*, 235a.

Respondents also challenged the "partisan activities" provisions, which state that "judge[s]" and "candidate[s] for election to judicial office shall not":

> (a) * * * identify themselves as members of a political organization, except as necessary to vote in an election. * * *
>
> (d) attend political gatherings; or seek, accept or use endorsements from a political organization.

52 Minn. Stat., Code of Jud. Cond., Canon 5A(1). The partisan activities restrictions further declare that candidates' campaign "committees * * * shall not seek, accept or use political organization endorsements." *Id.*, Canon B(2). Respondents challenged those restrictions insofar as they bar judicial candidates from attending or speaking at political party gatherings, identifying themselves as members of political parties, or seeking, accepting, or using political party endorsements.

Respondents further challenged a third provision, the so-called "announce clause" of the Code of Judicial Conduct, which, as explained below, has been invalidated by this Court, was repealed by the Minnesota Supreme Court, and is no longer at issue in this case.

B. The Initial District Court And Court Of Appeals Decisions And This Court's Decision In *White*

The district court upheld all three clauses, App., *infra*, 306a-307a, and the Eighth Circuit affirmed, *id.* at 239a. This Court granted respondents' petition for a writ of certiorari, but limited its review to the announce clause. App., *infra*, 181a; *Republican Party* v. *Kelly*, 534 U.S. 1054 (2001). The Court then reversed. App., *infra*, 144a; *Republican Party* v. *White*, 536 U.S. 765 (2002).

The Court began by noting the announce clause's extremely broad scope. That clause, as the Court described it, prohibited "a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running." App., *infra*, 129a. Candidates were even barred from criticizing precedents if the candidate also stated that he or she was not required to follow them. *Id.* at 129a-130a. That broad clause, the Court held, did not survive strict scrutiny. *Id.* at 140a.

The Court then addressed whether that clause "serves the State's interest in maintaining both the appearance of * * * impartiality and its actuality." App., *infra*, 132a-133a n.7. But the Court distinguished among three different aspects of impartiality—(a) avoiding bias or the appearance of bias against particular *parties*; (b) avoiding preconceived notions about *the law*; and (c) ensuring *open-mindedness* on *legal issues*. *Id.* at 131a-140a. The Court agreed that avoiding bias for or against particular *parties* was essential to due process. *Id.* at 131a-132a. But it held that the announce clause was not narrowly tailored to serve that purpose. By its terms, the clause regulated speech on *legal issues*; it did not purport to regulate associational activities that might raise concerns about attitudes toward particular *parties*. *Id.* at 132a. Turning to whether States have a compelling interest in preventing judicial candidates from having preconceived notions about the law, the Court held that States do not. Anyone qualified to be a judge, the Court stated, would necessarily have *some* preconceptions about legal issues. *Id.* at 133a-134a. Finally, the Court dismissed Minnesota's interest in ensuring that judges remain open-minded. The Court concluded that regulation of campaign speech alone was so underinclusive that preserving open-mindedness could not have been the announce clause's actual purpose. *Id.* at 134a-141a.

Justices Ginsberg, Stevens, Souter, and Breyer dissented. The dissenters observed that, because judges "perform a function fundamentally different from that of the people's elected representatives," there should be a distinction between "elections for political office, in which the First Amendment holds sway, [and] elections designed to select those whose office it is to administer justice," where it does not. App., *infra*, 161a, 163a (Ginsburg, J., dissenting). Judges' First Amendment rights, the dissenters observed, are not the only constitutional concern at stake: "[The] judicial obligation to avoid prejudgment corresponds to the litigant's right * * * to 'an impartial and disinterested tribunal * * * .'" *Id.* at 171a (quoting *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

C. The Decisions Below

On remand, a panel of the Eighth Circuit initially upheld the solicitation clause and remanded the partisan-activities regulations. App., *infra*, 88a-122a.[2] The Eighth Circuit granted rehearing *en banc*. *Id.* at 87a. Applying strict scrutiny, the Eighth Circuit then struck down the challenged portions of the partisan-activities prohibition and the solicitation clause. *Id.* at 1a-86a.

1. At the outset, the Eighth Circuit rejected Minnesota's interest in preserving judicial "independence" from political influences. App., *infra*, 18a n.7. The Eighth Circuit

---

[2] The remand required the district court to take evidence concerning the need for the partisan-activities clause, the justification for the distinction between political parties and other organizations, and whether banning certain partisan activities by candidates solely during elections "is arbitrary." App., *infra*, 107a.

acknowledged the State's interest in preserving public confidence in its judiciary by insulating judges and judicial candidates from partisan entanglement. Insofar as that represented an effort to maintain separation of powers—*i.e.*, a government with a political executive and legislature but a non-political judiciary—the Eighth Circuit held the interest insufficiently compelling. *Ibid.* No court, the Eighth Circuit declared, has ever determined that a State's "interest in maintaining separation of powers is sufficiently compelling to abridge core First Amendment freedoms." *Ibid.*

The Eighth Circuit then accused the Minnesota Supreme Court of "compromis[ing] any separation of powers framework [in] Minnesota's constitution." App., *infra*, 20a n.7. Minnesota's highest court, the Eighth Circuit asserted, had acted "without apparent constitutional or statutory authority" in creating Canon 5, invading the authority "to regulate the political climate of statewide elections * * * seemingly granted only to the Minnesota legislature * * *." *Ibid.*

2. The Eighth Circuit then turned to the State's interest in "impartiality." The court of appeals acknowledged that States have a compelling interest in guaranteeing that judges are not biased for or against a *particular party* to a proceeding. App., *infra*, 22a. The court of appeals also acknowledged that States may have an interest in ensuring that judges remain open-minded on legal issues, and do not by their campaign statements become incapable of considering issues anew in the specific cases before them. *Id.* at 31a-32a. But the court of appeals struck down the challenged portions of the partisan-activities prohibition and solicitation clause nonetheless.

a. With respect to the partisan-activities prohibition, the Eighth Circuit asserted that it is directed toward associational activities that are "part-and-parcel of a candidate's speech for or against particular *issues* embraced by the political party." App., *infra*, 25a. The court of appeals therefore held that the partisan-activities prohibitions were indistinguishable from the speech restrictions invalidated by this Court in *White* because neither "serve[s] the due-process rights of *parties*" to litigation. *Ibid.* While the court of appeals conceded that political parties are often litigants or otherwise interested in particular cases, it concluded that such conflicts could be addressed through recusal. *Id.* at 26a.

The Eighth Circuit then addressed Minnesota's interest in ensuring that its judiciary remains open-minded, rather than pre-committed, on issues of law. After this Court's decision in *White*, the Minnesota Supreme Court amended its Code of Judicial Conduct to emphasize that interest: "'Impartiality,'" the amended canons now declare, "denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintaining an open mind in considering issues that may come before the judge.*" App., *infra*, 49a (quoting 52 Minn. Stat., Code of Jud. Cond., Canon 5E (as amended Sept. 14, 2004)) (emphasis added).

The Eighth Circuit dismissed that interest, holding that preserving open-mindedness could not be the restrictions' true purpose because they were "woefully underinclusive." App., *infra*, 31a. Limits on a candidate's partisan activities during a judicial campaign, the court of appeals reasoned, cannot counteract "a lifetime of commitment" to a political party and its positions. *Ibid.* Further, that court of appeals held, the partisan-activities prohibition is too limited in scope, because it does not prohibit a judicial candidate from associating with "interest groups." *Id.* at 33a-35a. The court of appeals rejected the notion that there is any significant difference between powerful, well-organized political parties and special interest groups. *Id.* at 38a. And it likewise rejected the idea that Minnesota can "'take one step at a time, addressing itself to the phase of the problem which seems most acute * * * .'" *Id.* at 39a (quoting *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955)).

b. Finally, as respondents urged, the Eighth Circuit invalidated the solicitation clause insofar as it barred candidates from personally soliciting contributions from "large groups" (an undefined phrase) and proscribed them from personally signing solicitation letters. App., *infra*, 41a-42a.

The court of appeals first rejected the dissenting judges' conclusion that intermediate scrutiny should apply to fundraising activities. Personal solicitation of funds, the Eighth Circuit stated, is core political speech because the requested "funds [are] to be used in promoting a political message." App., *infra*, 42a.

The court of appeals then rejected Minnesota's contention that the solicitation clause advanced the State's compelling interest in an independent and impartial judiciary. App., *infra*, 44a-45a. Contributions still must be made to a campaign committee, which cannot disclose to the candidate who has and has not contributed. That mechanism, the Eighth Circuit held, was sufficient to protect the State's interest in preventing bias for or against particular parties. *Ibid.* The court did not explain how having the judge's signature (rather than that of the campaign committee chair) on letters soliciting funds would contribute to political discourse. It did not address the appearance of impropriety that arises when a sitting judge or a candidate personally asks, by letter or before a "large" audience, for money from individuals or lawyers who may have financial or other interests in the outcome of cases he or she may be asked to decide. *Id.* at 44a-46a. Nor did it explain how candidates could sign personal letters without noticing to whom they are addressed, saying only that "[a]n actual * * * candidate's signature on a contribution letter will not magically endow him or her with a power to divine * * * to whom that letter was sent." *Id.* at 44a.

4. Three judges dissented, and four others joined only portions of the majority opinion. The dissenters pointed out that the court had adopted "an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat." App., *infra*, 47a. Unlike the announce clause at issue in *White*,

"[t]he partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate's *relations with people, and organizations of people,* not the candidate's relations *with issues.*" *Id.* at 50a (emphasis added). "[T]he participation of judges who have been allowed or forced to make themselves dependent on party largesse for their continued tenure," the dissenters explained, "affects the state's ability to provide neutral judges and [to protect] the public perception of such neutrality." *Id.* at 56a.

The dissenters faulted the majority for ignoring the risk of corruption and the perception of corruption. App., *infra,* 52a. They observed that Congress, "to serve the great end" of "impartial execution of the laws," had barred *executive branch* employees from having "substantial roles in partisan political campaigns," and from "run[ning] for office on partisan political tickets." *Id.* at 53a (quoting *United States Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 567 (1973)). If the need for "impartial[ity]" is a compelling interest for the executive branch, the dissenters observed, it is even "more important for the judicial branch." *Id.* at 54a. "The State has a compelling interest in keeping its judges free from the odor of self-interest or partisanship." *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision in this case strikes down as unconstitutional two provisions of Minnesota's Code of Judicial Conduct critical to ensuring that the State's judiciary is—and is seen to be—above party politics and the corrupting influences of money. The decision has profound consequences not only for the States in the Eighth Circuit, but also for every State with judicial elections. Dozens of States with elected judiciaries have restrictions virtually indistinguishable from one or more of those invalidated by the Eighth Circuit here, and similar provisions appear in the ABA's Model Code. As a consequence of the Eighth Circuit's decision and a similar decision of the Eleventh

Circuit, *Weaver* v. *Bonner*, 309 F.3d 1312 (2002), eight States in those Circuits now confront binding precedent invalidating portions of their ethics codes regulating judicial campaigns.[3] Candidates and judges in the many other States with similar rules are uncertain about what conduct is proper, and those charged with overseeing compliance are unsure which prohibitions they may lawfully enforce. With 30 States holding supreme court elections in 2006,[4] this Court's immediate review is needed to resolve growing uncertainty in this important area of law.

The Eighth Circuit's decision intrudes severely on the States' ability to preserve the integrity and credibility of their judiciaries. Under it, judicial candidates are constitutionally entitled to seek money through signed letters sent to, and through in-person appeals before "large" groups of, current and potential litigants and their lawyers. This Court has repeatedly recognized the government's powerful interest in redressing money's corrosive effect on public confidence in the integrity of the political branches. See, *e.g.*, *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 136-137 (2002). The Eighth Circuit's decision undermines the States' even more powerful interest in preventing the fact or appearance of corruption that arises when judges and judicial candidates seek money from those who may have interests in the cases before them. In addition, the decision allows judicial candidates to engage in partisan activities, declaring allegiance to a political party and its platform. That is anathema to the States' compelling interest in having judicial branches that are and are seen to be non-political, nonpartisan, and impartial.

---

[3] These States are Arkansas, Florida, Georgia, Minnesota, Missouri, North Dakota, Nebraska, and South Dakota. See p. 13-15 n.5, *infra*; App., *infra*, 323a-398a (collecting state codes).

[4] Justice at Stake, Scheduled Supreme Court Elections 2006-2008, avail. http://www.justiceatstake.org/files/SCElections06to08.pdf.

Regulations addressing the speech of judges and judicial candidates are, of course, subject to First Amendment scrutiny, as *Republican Party* v. *White*, 536 U.S. 765 (2002), shows. But the Eighth Circuit misread *White* to preclude virtually any regulation of judicial elections, without regard to judges' unique status in our system of government or the highly attenuated nature of the First Amendment interests. The provisions at issue here are wholly different from the obsolete "announce clause" struck down in *White*. The solicitation clause does not restrict judicial candidates' speech about legal issues; it addresses only their requests for *money*. And the partisan-activities prohibition, far from restricting the *expression of viewpoints* important to judicial selection, regulates the *relationship* of judicial candidates to political parties. States have a compelling interest in preventing the judiciary from being or being seen as a political branch that behaves like the policy-making branches.

"The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989). Consequently, the States' "interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial* v. *Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978). Yet far from according respect to this most fundamental of State concerns, the Eighth Circuit adopted an interpretation of strict scrutiny that renders *any* judgment the State makes in this area either too sweeping to be narrowly tailored or too underinclusive to serve the stated rationale. App., *infra*, 47a, 79a. That deprives the States of a critical tool in their efforts to prevent their judicial systems from being transformed into "super-legislatures" for advancing partisan goals that could not be achieved through the political process—a result that should not be imposed absent review by this Court.

I. The Decision Below Resolves Overwhelmingly Important First Amendment Issues With Profound Consequences For State Judiciaries

A. The Decision Below Invalidates Restrictions On Personal Solicitation That Are Critical To Preserving Impartiality And Public Confidence In The Judiciary In Dozens Of States

Even in the context of the political branches, this Court consistently has recognized the potentially corrupting effect of money on the faithful discharge of official function and the corresponding erosion of public confidence. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 37 (1976); *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 143-144 (2002). "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns." *Fed. Election Comm'n* v. *Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 497 (1985). "Of almost equal concern as the danger of *actual* quid pro quo arrangements is the impact of the *appearance of corruption* * * * ." *Buckley*, 424 U.S. at 27 (emphasis added). The interest in combating corruption and the appearance of infidelity to duty in the *judicial* branch—where due process guarantees both the appearance and the reality of an impartial proceeding—is more compelling still. See *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

For that reason, Minnesota and 28 other States have banned candidates for judicial office from personally soliciting money.[5] Under the Eighth Circuit's decision, however, letters asking for money, personally signed by judges or judicial candidates, may now be sent to the very persons who are likely to appear before them. App., *infra*, 46a. Likewise, judges may now personally ask for money before "large" groups—without regard to the interests that some persons in the group might have in the decisions of the court to which the candidate seeks election. *Ibid.* The Eleventh Circuit, in *Weaver* v. *Bonner*, 309 F.3d 1312, 1315 (2002), went further, striking down Georgia's bar on direct solicitation across the board, opening the door for judicial candidates to make in-person requests for money to anyone, including those who may appear before them. Those decisions intrude gravely on the States' ability to ensure their judicial systems both remain and appear above reproach.

---

[5] See Alaska Court Rules, Code of Jud. Cond., Canon 5C(3) (West 2006); 17A Ariz. Rev. Stat. Ann., S. Ct. R. 81, Code of Jud. Cond., Canon 5B(3) (West 2005); Ark. Code Ann., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005); Colo. Ct. Rules Ann., Ch. 24, Colo. Rules of Jud. Discipline, Code of Jud. Cond., Canon 7B(2)(d) (West 2005); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(1) (West 2005); Idaho Rules of Court, Code of Jud. Cond., Canon 5C(2) (West 2001); Ill. Comp. Stat. Ann., Code of Jud. Cond., S. Ct. R. 67, Canon 7B(2) (West 2005); Ind. Code Ann. tit. 34,

Tellingly, the Eighth Circuit's decision fails to address the *appearance* of partiality and corruption that results when judges and candidates solicit money from those who

---

Code of Jud. Cond., Canon 5C(2) (West 2002); Kan. S. Ct. R. 601A, Canon 5C(2) (West 2002); Ky. Rev. Stat. Ann., S. Ct. R. 4.300, Ky. Code of Jud. Cond., Canon 5B(2) (West 2005); La. Rev. Stat. Ann., Code of Jud. Cond., Canon 7D(1) (West 2005); Mich. Comp. Laws Ann., Code of Jud. Cond., Canon 7B(2)(a) (West 2005); Miss. Rules of Court, Code of Jud. Cond., Canon 5C(2) (West 2005); Mo. Rules of Court, Code of Jud. Cond., Canon 5B(2) (West 2005); Neb. Court Rules & Procedure, Code of Jud. Cond., Canon 5C(2) (West 2005); N.Y. Judiciary Law, app., N.Y. Code of Jud. Cond., Canon 5A(5) (McKinney 2003); N.D. Court Rules, Code of Jud. Cond., Canon 5C(2) (West 2005); Ohio Rev. Code Ann., Code of Jud. Cond., Canon 7(C)(2)(a) (West 2005); Okla. Stat. Ann., tit. 5, ch. 1, app. 4, Code of Jud. Cond., Canon 5C(2) (West 2001 & Supp. 2005); Or. Rules of Court, Code of Jud. Cond., R. 4-102(D) (2005); Pa. Cons. Stat. Ann., Code of Jud. Cond., Canon 7B(2) (West Supp. 2005); S.D. Codified Laws, ch. 12-16, app., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005); Tenn. Rules of Court, S. Ct. R. 10, Code of Jud. Cond., Canon 5C(2)(a) (West 2005); Utah Code of Jud. Admin., ch. 12, Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2001); Wash. Ct. Rules, Code of Jud. Cond., Canon 7B(2) (West 2000); W. Va. Code Ann., State Court Rules, Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2004); Wis. Code Ann. ch. 60, S. Ct. R. 60.06(4) (West 2005); Wyo. Court Rules Ann., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005).

may appear before them. The Eighth Circuit ruled that Minnesota must tolerate such solicitation because, under an unchallenged portion of Canon 5, campaign committees provide a buffer between donors and candidates. Invoking the due process standard, the Eighth Circuit declared it "unlikely" that a judicial candidate would, once elected, have "a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against" a particular litigant because the campaign committee would shield the judge from learning who contributed and who did not. App., *infra*, 44a (quoting *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927)). But that myopic focus ignores the perspective of the individuals solicited, who may feel pressured to give, then feel entitled to a quid pro quo when they do. It ignores the perspective of those who are unsuccessful in court, who may never accept that their case was adjudicated on the merits, rather than on the money. And it ignores the perspective of the general public, whose confidence in the judicial system is bound to be compromised by the sight of judges with their hands out.[6] Ignoring those consequences does not make them go away.[7]

---

[6] See, *e.g.*, Nat'l Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, 8 (1999), avail. at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (finding that 78% of respondents agree that "Elected judges are influenced by having to raise campaign funds"); Memorandum from S. Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, Inc. & L. DiVall, President, American Viewpoint, to G. Palast, Executive Director, Justice at Stake Campaign 1 (Feb. 14, 2002), avail. at http://www.greenbergresearch.com/publications/reports/rJASsummary.pdf ("Seventy-six percent of voters * * * believe that campaign contributions made to judges have at least some influence on their decisions.").

[7] The Eighth Circuit's decision also improperly deems the State's interest in impartiality insufficiently compelling *unless necessary* to avoid a due process violation. But the State's interest in preserving the integrity of and public confidence in its judiciary is not limited to protecting the bare rudiments of fairness mandated by due process. See, *e.g.*, *Mills* v. *Rogers*, 457 U.S. 291, 303 (1982) (recognizing that States may "require

As Justice Kennedy has stated, "the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral." *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (transcript avail. http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html). The prohibition on personal solicitation adopted by Minnesota and more than two dozen other States is intended to preserve neutrality and public respect. It should not be cast aside without the benefit of this Court's considered review.

B. The Decision Below Eliminates Protections Essential To The Preservation Of Truly Nonpartisan Judicial Elections In Numerous States

The Eighth Circuit's decision also eviscerates the States' ability to keep their judiciaries free from the specter of partisan political influence. Most States and the United States have adopted codes of conduct that bar sitting judges from involving themselves in politics. See, *e.g.*, Code of Cond. for United States Judges, Canon 7 (a federal judge should not "make speeches for a political organization or candidate," "attend political gatherings," or "engage in *any other political activity*," except activities to improve the administration of justice described in Canon 4) (emphasis added); Fed. Code of Cond. for Jud. Employees, Canon 5; App., *infra*, 328a-393a (collecting state codes).

Minnesota's Canon 5A(1) applies similar rules to judges and judicial candidates alike, declaring that they shall not "identify themselves as members of a political organization, except as necessary to vote in an election" or "attend po-

---

greater protection of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause"); *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (upholding prohibition on picketing near courthouse with intent to influence the judge even though such picketing would not violate due process). Due process is a floor, not a ceiling. The Eighth Circuit's decision inverts that relationship, hobbling the States' ability to provide anything beyond minimum constitutional protections.

litical gatherings." Minnesota's Canon 5B(2) reinforces that, barring candidates and campaign committees from "seek[ing], accept[ing] or us[ing] political organization endorsements." Nine other States with nonpartisan judicial elections impose similar restrictions on judicial candidates.[8]

Those restrictions are critical to preserving "the freedom of [judicial] officials from the control of partisan politics." *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004). As the ABA explained when adopting similar rules in its first canons 80 years ago, "'it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes an active promoter of the interests of one political party as against another.'" App., *infra*, 273a (quoting ABA Canon 28 (1924)). The Eighth Circuit's decision sweeps those considered judgments aside—potentially as to judges and judicial candidates alike. See pp. 26-30, *infra*. Moreover, it thwarts the possibility of reform in other nonpartisan States, where the creeping influence of party politics has the potential to render (or in some cases has already rendered) the elections nonpartisan in name only.

---

[8] Of the 19 States with some nonpartisan judicial elections, nine limit statements of party affiliation. Ark. Code Ann., Code of Jud. Cond., Canon 5A(1)(f) and 5C(1)(a)(iii) (Lexis Nexis 2005); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(3) (West 2005); Ky. Rev. Stat. Ann., S. Ct. R. 4.300, Ky. Code of Jud. Cond., Canon 5A(2) (West 2005); 52 Minn. Stat. Ann., Minn. Code of Jud. Cond., Canon 5A(1)(a); Miss. Code Ann. § 23-15-973 (West 2005); Nev. Rev. Stat. Ann., S. Ct. Rules, Part VI, Nev. Code of Jud. Cond., Canon 5C(1)(ii); Or. Rules of Court, Code of Jud. Cond., R. 4-102(C); S.D. Codified Laws, ch. 12-16, App., Code of Jud. Cond., Canon 5C(1)(a)(ii) (Lexis Nexis 2005); Wash. Ct. Rules, Code of Jud. Cond., Canon 7(A)(1)(e) (West 2000); Wis. Code Ann., ch. 60, S. Ct. R. 60.06(2)(b) (West 2005). Arkansas and Florida allow speaking at party gatherings if the candidate's opponent is also invited to speak. Ark. Code Ann., Code of Jud. Cond., Canon 5C(1); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(3). Three States prohibit seeking party endorsement. Ark. Code Ann., Code of Jud. Cond., Canon 5A(1)(d); Idaho Rules of Court, Code of Jud. Cond., Canon 5A(1)(d); Miss. Code Ann. § 23-15-973.

As the dissenting opinion below observed, partisan activities threaten to establish a system in which "candidates [must] plac[e] themselves in debt to powerful and wide-reaching political organizations that can make them or break them in each election." App., *infra*, 49a. The effects are easily envisioned: decisions split along party lines, opinions or votes that appear directed to obtaining party support in the face of future elections, and favoritism and patronage toward the party faithful. See CA Br. of Amicus Curiae Conf. of Chief Justices 13-15 (Aug. 10, 2004). The effect of permitting political party entanglement in nominally nonpartisan judicial elections is readily apparent in States like Michigan and Ohio.[9] It is no surprise that lawyers in Indiana—the one State that has partisan, nonpartisan and merit-retention elections—ranked partisan elections last when polled on their views of judicial selection systems. C. Solida, *The Two Sides of Merit Selection*, Ind. Lawyer, Sept. 16, 1998, at 1.

There is "a fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U.S. 380, 400 (1991). Minnesota has an interest of the highest order in mitigating that tension to preserve the integrity of its judicial system. It, like many other States, legitimately chose to do so by separating the judicial process, and the judicial selection process, from partisan competition for political control. If that judgment is to be set aside, it should be set aside only by this Court.

---

[9] Although party labels appear nowhere on either State's judicial ballot, the parties in fact choose and help bankroll the "independent" candidates, who without that support have essentially no hope of victory. See, *e.g.*, D. Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, (2004) avail. http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf. Minnesota has a compelling interest in choosing a different course.

C. The Decision Below Tramples The States' Authority To Structure Their Own Governments

It is "[t]hrough the structure of its government" that "a state defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). The Eighth Circuit's ruling cuts deeply into the States' ability, as sovereigns in our federal system, to craft their governments to include elected but nonetheless independent judiciaries.

1. Most States have structured their governments—like the federal government—so that the judicial branch is explicitly non-political, setting it apart from the legislative and executive branches. As the Minnesota Supreme Court explained in connection with the partisan-activities clause:

> [T]he separation of powers inherent in the creation of three distinct branches of government, * * * provides the constitutional underpinning for the independence of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.

In re Amendment of the Code of Jud. Cond., *supra*, at 4-5.

Because judges represent "the Law," they—unlike their "counterparts in the political branches"—"are expected to refrain from catering to particular constituencies * * * . Their mission is to decide 'individual cases and controversies' * * *, neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will,' Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989)." App., *infra*, 159a-160a (Ginsburg, J., dissenting). Rewarding supporters, building coalitions, and supporting the "party line" may be salutary, even necessary, for those elected officials whose role is to reflect the people's will. But that is not and should not be seen as the nature of the judicial process.

Most courts have a Chief Judge or Chief Justice. None has, nor should have, a majority whip.

The Eighth Circuit, however, belittled the State's interest in having two political branches and a distinct, nonpolitical judicial branch. However basic "separation of powers" may be to "Minnesota's constitution," that court stated, "the right to free political speech and association guaranteed by the First Amendment is no less basic a concept. Indeed, First Amendment rights are even more fundamental," because the "right to free and open elections undergirds the framework of government established by any constitution." App., *infra*, 20a n.7. But the question is not whether the First Amendment or the independence of the judiciary (which must protect First Amendment rights) is more important. It is whether the balance Minnesota struck is permissible. Nowhere did the Eighth Circuit explain how the purpose of judicial elections is advanced by partisan affiliations that conflict with the judicial function by rendering judges and candidates beholden—in appearance if not actuality—to powerful political parties rather than to the rule of law.

2. The Eighth Circuit's decision also intrudes on more than a century and a half of State efforts to make their judicial systems fairer, more impartial, and free from partisan influence or control. As discussed above, the move to judicial elections early in this Nation's history was a response to "[c]oncerns about the penetration of partisanship into the appointive judicial selection process." Hall, 45 Historian at 346; see pp. 1-2, *supra*. Reformers believed that, under an elective system, "parti[s]an influences never could wholly prevail, nor popular opinion be moulded and controlled by demagogues." Nelson, *supra*, at 195 (quoting Report of the Debates & Proceedings in the New York State Convention, for the Revision of the Constitution 484 (Albany 1846) (remarks of Conrad Swackhamer)). When the influence of partisan politics threatened judicial independence by making judges reliant on parties for

election and re-election, States adopted the further reform of nonpartisan elections.[10]

The restrictions struck down by the Eighth Circuit in this case represent Minnesota's considered effort to protect the unique function of judges in its system of government. Unlike legislators, judges decide only the cases before them, as framed by the litigants, not any issues on which they might wish to opine. Unlike legislators, judges are bound by the doctrine of stare decisis (whether interpreting positive law or developing common law). And unlike legislators, judges may not decide issues based on party loyalties or their personal views of wise social policy. The political branches "represent[] 'the People'; the judge represents the Law—which often requires him to rule against the People." *Chisom*, 501 U.S. at 411 (Scalia, J., dissenting). The Eighth Circuit's refusal to recognize any distinction between electing judges and electing lawmakers blinks reality and disrupts the States' efforts to select a judiciary that is both apolitical and truly independent.

3. Finally, the Eighth Circuit's decision reflects an unfortunate disregard for the important role of the States in defining their own institutions. Indeed, the decision goes

---

[10] In the 1960s and 1970s, several States adopted new constitutions or amendments that provided for judges to be appointed in the first instance, to be followed by retention elections. See W. Hall & L. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 Judicature 340, 340 (1987). More recent history has shown, however, that voters are increasingly "unlikely to disenfranchise themselves and amend their state constitutions" by eliminating popular ballot as a means of judicial selection. E. Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent L. Rev. 133, 149 (1998). Consequently, many States in the last 25 years have adopted nonpartisan elections as a means of reform. See Ga. Const. art. 6, § 7, ¶ I (amend. July 1, 1983); Miss. Code Ann. § 23-15-976 (West 1999); Miss. Laws, ch. 301, § 16 (Jan. 15, 1999); Ark. Const. Amend. 80, § 18 (approved Nov. 7, 2000, eff. July 1, 2001); Gen. Assembly Of North Carolina Session 2001, Session Law 2002-158, Senate Bill 1054 (2001).

so far as to accuse the *Minnesota Supreme Court* of violating *state* separation of powers principles by issuing Canon 5 "without apparent constitutional or statutory authority" under state law. App., *infra*, 20a n.7. But the federal courts have no role in determining a state court's authority under state law. Even where plaintiffs challenge executive conduct on state-law grounds, federal courts must stay their hands. *Penhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 121 (1984). The Eighth Circuit's unwarranted attack on court-promulgated judicial codes cannot stand.[11]

Ultimately, rather than respect the States' continuing efforts as "laboratories" to enhance judicial competence and independence, see *New State Ice Co.* v. *Liebmann*, 285 U.S. 371, 386-387 (1932) (Brandeis, J., dissenting), the decision below disdains any system of judicial selection that differs from the federal model. The Eighth Circuit did not merely confess "bias in favor of a system for the appointment of judges." App., *infra*, 9a. Rather, the author of the Court's *en banc* opinion previously opined that the goal of neutrality "could be most efficiently and effectively achieved by amending the Minnesota Constitution to allow for the appointment rather than the election of judges." *Id.* at 270a (Beam, J., dissenting). But it was the *failure* of the appointment system in many States that led to the popular ballot as a reform, and the entanglement between candidates and political parties that led to nonpartisan ballots as a further reform. Besides, simply prescribing the federal model—a "solution" that would require the legislatures and voters of numerous States to amend state constitutions to set aside longstanding methods of judicial selection—is no solution at all.

---

[11] Most state supreme courts have grants of authority similar to Minnesota's, or promulgate rules under their inherent authority. See, *e.g.*, Ala. Const. art. IV, § 147(c); Ga. Const. art. 6, § 7, ¶ VII; Fla. Const. art. V (see also *Chandler* v. *State*, 366 So. 2d 64 (Fla. App. 1978)); Ill. Const. 1970, art. VI, § 136(a); Ky. Const. §121; Mo. Const. art. 5, §§ 5 & 24; Nev. Const. art. 6, § 21; N.Y. Const. art. 6, § 20; N.C.G.S.A. § 7A-10.1; N.D. Stat. § 27-23-03; Ohio Const. art. IV, § 5; Okla. Stat. Ann. § 1404; Or. Const. art. VII, § 8; 42 Pa. Code Stat. Ann. § 1722(a)(2); Pa. Const. art. 5, § 18; R.I. Const. art. 3, § 8; Tex. Const. art. 5, § 1-a; 4 Vt. Stat. Ann. § 3; Va. Stat. § 54.1-3909; Wash. Const. art. IV, § 31; W. Va. Const. art. 8, § 18; Wyo. Const. art. 5, § 6; *In re Petition of Judicial Conduct Committee*, 855 A.2d 535 (N.H. 2004) (inherent power); *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (same); *In re Promulgation of a Code of Judicial Ethics*, 153 N.W.2d 873, 155 N.W.2d 665 (Wis. 1967) (same).

D. Confusion Reigns In State And Federal Courts

The law concerning State regulation of judicial elections is in disarray. The candidates, the courts, and the officials who must enforce the law desperately require guidance. As one trial court observed:

> To say there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. Whether the decision in *White* left *any* room for the regulation of the speech of judicial candidates is a question yet to be resolved. * * * It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates.

N.D. Family Alliance v. *Bader*, 361 F. Supp. 2d 1021, 1041-1042 (D.N.D. 2005); see R. Salokar, *After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 Just. Sys. J. 149 (2005) (detailing difficulty in applying *White* in Florida).

Some federal courts have read *White* broadly to imply that judicial speech is no different from speech in other elections, so that the challenged restrictions invariably fail strict scrutiny review. For example, striking down Georgia's ban on personal solicitation *sua sponte*, the Eleventh Circuit declared: "[W]e believe that the Supreme Court's decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections." *Weaver*, 309 F.3d at 1321; see also *Bader*, 361 F. Supp. 2d at 1042; *Family Trust Found. of Ky.* v. *Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004);

Spargo v. *N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 88 (N.D.N.Y. 2003), vacated on other grounds, 351 F.3d 65 (2003), cert. denied, 541 U.S. 1085 (2004).

White itself, however, disavows any such suggestion: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." App., *infra*, 139a. Accordingly, many courts refused to extend *White* beyond the obsolete "announce" clause at issue in that case. See, *e.g.*, *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (upholding prohibition on judges contributing to political campaigns as essential to preventing political bias and corruption); *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (upholding New York's "pledges and promises" clause as essential to impartiality in the state judiciary); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) ("pledges or promises clause" distinguishable from the announce clause at issue in *White*, because judges may state their opinions, so long as they ensure that voters understand a judge's duty to uphold the constitution and laws of the state); *In re Angel*, 31 Fla. Bar News, No. 13 (July 1, 2004) (while "[e]very judicial election presents * * * a great opportunity * * * to educate our citizens about the proper role and responsibility of the Third Branch, * * * absolute impartiality and freedom from partisan influences are the most important of these responsibilities. * * * [J]udicial elections present a * * * risk that * * * confidence * * * will be undermined * * * if the public perception is that judges may act in a partisan manner—rather than strictly adhere to the Rule of Law."); *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding provision barring judges from soliciting "funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or candidate * * *," because "[i]t is exactly this activity that potentially creates a bias, or at least the appearance of a bias, for or against a party to a proceeding").

II. The Eighth Circuit Erred in Striking Down Minnesota's Rules

Far from supporting the Eighth Circuit's decision, this Court's decision in *White* underscores the legitimacy of the solicitation and the partisan-activities restrictions at issue here. *White* acknowledged the State's interest in "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary," particularly "the lack of bias for or against either *party* to the proceeding." App., *infra*, 130a-131a. It merely faulted the regulation at issue there because, rather than regulate the judicial candidate's relationship to *parties* with potential interests in litigation, it regulated the candidate's expression of *ideas* relevant to his performance of the judicial function. Here, in contrast, neither canon restricts the ability of judicial candidates to address *issues* relevant to their performance as judges, and neither forestalls vigorous public debate. The provisions here merely address *relationships* with interested persons and parties—relationships that can create actual or apparent party bias, and interfere with judicial independence, by rendering the candidate seemingly beholden to political parties.

A. The Solicitation Clause Is Constitutional

Minnesota's restriction on direct solicitation serves precisely the interest this Court recognized in *White*. Surveys show that most people believe that "elected judges are influenced by having to raise campaign funds." Nat'l Ctr. for State Courts, *How the Public Views the State Courts*, *supra*, at 8. That impression is compounded when judges and candidates solicit money from those who have or may have cases in their courts. The clause is also narrowly tailored. It does not proscribe fundraising altogether. It simply requires that solicitations come from a campaign committee—not from the person who is expected to rule impartially on all matters coming before the court.

Unlike the restriction at issue in *White*, moreover, the solicitation clause has virtually no effect on speech. It regulates only particularly problematic proposals with little expressive content—requests for money—not by barring them but by separating the solicitation from the judicial candidate.[12] For that reason, the Eighth Circuit erred in applying strict scrutiny. Regulations that deal not with speech but with the potentially corrosive effect of money should be subject to the "less demanding" standard of intermediate scrutiny. *McConnell*, 540 U.S. at 136.

Even under strict scrutiny, however, the solicitation clause is constitutional. The Eighth Circuit's primary rationale in reaching the contrary conclusion was its view that *actual corruption* is a relatively minor risk. App., *infra*, 43a-44a. But that fails to address the States' equally compelling interest in preventing the *appearance* of impropriety. Whether from the viewpoint of the donor, the losing litigant, or the public as a whole, States have a compelling interest in addressing even the "appearance of corruption stemming from public awareness of the opportunities for abuse." *Buckley*, 424 U.S. at 27; see *McConnell*, 540 U.S. 93, 134-152 (repeatedly upholding the compelling interest in avoiding the appearance of corruption); p. 15, *supra*. Particularly given the minimal impact on speech, Minnesota's effort to keep its courts above such suspicions should be respected.

B. The Partisan-Activities Prohibition Is Constitutional

Contrary to the Eighth Circuit's decision, the partisan-activities clause likewise survives constitutional scrutiny consistent with *White*. The court of appeals viewed partisan activities and associations as essentially equivalent to the "announce" restrictions in *White*. According to the Eighth Circuit, such associations serve as a convenient short-hand for the candidate's agreement with a party on significant issues. App., *infra*, 24a-25a. Even setting aside the questionable value of such short-hands in the judicial context—particularly given a candidate's ability to speak on the issues directly—a candidate's partisan activities do much more than signal potential agreement on issues. They also establish a *relationship* between the judicial candidate and powerful political parties, as well as their leaders and adherents, who are keenly interested in the candidate's resolution of a wide range of cases. The goal of the partisan-activities clause is to "prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their independence, while allowing them alternative means of communicating subjects of valid interests to voters." App., *infra*, 213a. As explained above, pp. 17-18, *supra*, such indebtedness erodes judicial independence. It gives political parties the ability to demand fealty not to the law, but to the party agenda. And it raises the specter of litigant-specific bias, since judicial candidates identified as partisan may, at the very least, *appear* partial toward particular litigants in certain cases. Citizens should not have to consider whether the judge is Republican or Democrat, or what the Republican or Democratic Party might think about their case, when they approach a court for evenhanded justice.

---

[12] As Justice Stevens stated in his concurring opinion in *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), "Speech has the power to inspire volunteers * * *. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results." *Id.* at 398.

For similar reasons, Congress has restricted the political activities of federal employees. See 5 U.S.C. § 7323; 15 U.S.C. §§ 1501, 1502. As this Court explained when upholding the Hatch Act in *United States Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-565 (1973):

> It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should admini-

> ster the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party. They are expected to enforce the law and execute the programs of government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—*impartial execution of the laws*—it is essential that federal employees, for example, not take formal positions in political parties, not undertake substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

No less than executive branch officers, judges "should administer the law in accordance with the will of [the legislature], rather than in accordance with their own will or the will of a political party," and "without bias or favoritism for or against any political party or group or the members thereof." *Id.* at 564-565.

The Eighth Circuit's rationale cannot be reconciled with *Letter Carriers* or ordinary First Amendment principles. That court first reasoned that the prohibition on partisan political activities was fatally underinclusive because it addresses only associations with political parties and not other groups. App., *infra*, 33a-35a. But the Hatch Act provisions at issue in *Letter Carriers* do precisely the same thing—a fact the Eighth Circuit fails to address. Political parties are singularly powerful forces in government, with a unique ability to command allegiance from members on a wide range of issues, regardless of the members' own viewpoints. See *McConnell*, 540 U.S. at 188 ("Political parties have influence and power in the Legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that * * * parties in turn have special access to and relationships with federal officeholders."). No less than the Hatch Act, the partisan-activities restrictions at issue here "reduce the hazards to fair and effective government," and further the compelling interest of maintaining both the fact and appearance of impartial application of the law.[13]

The Eighth Circuit also deemed those restrictions underinclusive because—although they always apply to judges—they bar "a judicial candidate from associative activities with a political party" only "during a campaign, though he may have been a life-long, active member of a political party." App., *infra*, 31a. But that analysis would invalidate *all* restrictions on the political activities of judges and executive branch employees. See pp. 16-17, 27-28, *supra*. Those prohibitions likewise do nothing to address the fact that an individual, before becoming a judge or employee, "may have been a life-long, active member of a political party." But they are hardly underinclusive as a result. They still serve the compelling interest of preserving both the fact and appearance of impartiality by enforcing the rule that, at some point, partisan activities must end. If those rules, which ban partisan activities only once the individual becomes a judge, are not fatally underinclusive, then *a fortiori* Minnesota's broader rule—which bans partisan activities both while candidates campaign for judicial office and later when they become judges—is not underinclusive either.[14]

---

[13] The Eighth Circuit also opined that recusal poses a less-restrictive means of ensuring that judges do not preside over cases in which they may harbor bias. App., *infra*, 26a. But recusal is not a viable solution where partisan affiliation is at issue, because virtually every judge would have to recuse in redistricting disputes, for example, which pit the parties against each other. Virtually every judge would also have to recuse whenever a high-ranking party member or the party itself has an interest in the matter. In any event, even if recusals eventually secure the litigants an unbiased judge, they do nothing to address the erosion of public faith that results when parties must wander from chambers to chambers, like Diogenes, searching for an unbiased, nonpartisan judge to decide their case. There is no reason Minnesota should be precluded from proscribing judicial candidates from engaging in conduct that would disqualify them from performing their job in important cases.

Minnesota has made the sensible determination that those campaigning to be judges must comport themselves just as they would once they become judges. To require Minnesota to extend its rules further and ban partisan activities before an individual even seeks judicial office, disqualifying those who have engaged in such conduct, is absurd. The fact that a judicial candidate may have supported or been supported by a party in some other past endeavor is hardly problematic; any other rule would reduce the available talent pool to a puddle. It is not until the individual becomes a candidate for judicial office that partisan affiliations raise serious concerns: Once candidates for judicial posts may seek party endorsements and run as party candidates for judicial positions, "the party becomes empowered to play the role of judge-maker"—and, in the case of re-election, a judge defeater. App., *infra*, 50a (dissenting opinion). By focusing its restriction on judicial candidates and judges, Minnesota has addressed the threat to judicial independence—and the perception that judges are indebted and beholden to powerful political interests for their tenure—that "is most overt." *Ibid.* Given the ability of judicial candidates to speak their mind on the issues, there is no compelling reason Minnesota should be constitutionally foreclosed from preventing partisan entanglement that threatens judicial independence and impartiality.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[14] To the extent the Eighth Circuit read Canon 5 to permit judges to engage in partisan activities when not campaigning, it misread that rule, which applies to "judge[s]" and "candidate[s] for judicial office."

Respectfully submitted.

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Deputy Attorney General

THOMAS C. VASALY
Assistant Attorney General

445 Minnesota Street
Suite 1100
St. Paul, MN 55101-2128
(651) 296-6752

THOMAS R. PHILLIPS
Counsel of Record
BAKER BOTTS L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701-4039
(512) 322-2500

JEFFREY A. LAMKEN
MICHAEL G. PATTILLO, JR.
JACOB A. SOMMER
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioners

October 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS—APPELLANTS,

GREGORY F. WERSAL, INDIVIDUALLY,

PLAINTIFF,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,

PLAINTIFFS—APPELLANTS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,

PLAINTIFF,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION,

PLAINTIFF—APPELLANT,

MUSLIM REPUBLICANS, AN ASSOCIATION; MICHAEL MAXIM, INDIVIDUALLY; KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFFS,

v.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD ON JUDICIAL STANDARDS, OR HER SUCCESSOR; KENNETH L. JORGENSEN, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE

MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

MINNESOTA CIVIL LIBERTIES UNION, AMICUS ON BEHALF OF APPELLANT,

THE MINNESOTA STATE BAR ASSOCIATION; THE CONFERENCE OF CHIEF JUSTICES; THE MISSOURI BAR; THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW; CAMPAIGNS FOR PEOPLE; CITIZEN ACTION/ILLINOIS; CONFERENCE OF AD HOC COMMITTEE OF FORMER JUSTICES AND FRIENDS; STATE OF ARKANSAS; ARKANSAS SUPREME COURT, AMICI ON BEHALF OF APPELLEES.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION; MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION; CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY; GREGORY F. WERSAL, INDIVIDUALLY; CAMPAIGN FOR JUSTICE, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF.

V.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD ON JUDICIAL STANDARDS, OR HER SUCCESSOR; KENNETH L. JORGENSEN, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS

PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR;
CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE
MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY
BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON
BEHALF OF APPELLEE,

THE CONFERENCE OF CHIEF JUSTICES; THE MISSOURI
BAR; THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL
OF LAW; CAMPAIGNS FOR PEOPLE; CITIZEN
ACTION/ILLINOIS; CONFERENCE OF AD HOC COMMITTEE OF
FORMER JUSTICES AND FRIENDS; STATE OF ARKANSAS;
ARKANSAS SUPREME COURT, AMICI ON BEHALF OF
APPELLEES.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION;
INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN
ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION;
YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA
NONPROFIT CORPORATION; MINNESOTA COLLEGE
REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

GREGORY F. WERSAL, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL,
INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,

PLAINTIFFS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,

PLAINTIFF—APPELLANT,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN
ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION;
MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFFS,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

v.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD ON JUDICIAL STANDARDS, OR HER SUCCESSOR; KENNETH L. JORGENSEN, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON BEHALF OF APPELLEES,

THE CONFERENCE OF CHIEF JUSTICES; THE MISSOURI BAR; THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW; CAMPAIGNS FOR PEOPLE; CITIZEN ACTION/ILLINOIS; CONFERENCE OF AD HOC COMMITTEE OF FORMER JUSTICES AND FRIENDS; STATE OF ARKANSAS; ARKANSAS SUPREME COURT, AMICI ON BEHALF OF APPELLEES.

NOS. 99-4021, 99-4025, 99-4029

Submitted: Oct. 20, 2004
Filed: Aug. 2, 2005

Before LOKEN, Chief Judge, McMILLIAN, JOHN R. GIBSON, WOLLMAN, BEAM, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, SMITH, COLLOTON, GRUENDER, and BENTON, Circuit Judges, en banc.

BEAM, Circuit Judge.

This case is before us en banc upon remand from the United States Supreme Court. We briefly outline what has occurred in this matter since its inception, believing that it will be helpful in analyzing the issues presented.

The dispute commenced in the United States District Court for the District of Minnesota. At issue were the so called "announce," "partisan-activities," and "solicitation" clauses of Canon 5 of the Minnesota Supreme Court's canons of judicial conduct. The district court rejected Appellants' First and Fourteenth Amendment claims, *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999), and granted summary judgment to Appellees: the Minnesota Board on Judicial Standards, the Minnesota Lawyers Professional Responsibility Board, and the Minnesota Office of Lawyers Professional Responsibility. *Id.* at 986. On appeal, a divided panel of this court affirmed the district court. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001). We denied Appellants' en banc suggestion. The Supreme Court granted certiorari and held, *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L. Ed. 2d 694 (2002), that the announce clause violates the First Amendment, reversing our holding in *Kelly*. The Court remanded the case for further proceedings consistent with its opinion. *Id.* at 788, 122 S.Ct. 2528. Upon remand, the same panel, divided as before, again affirmed the district court's ruling on the solicitation clause and remanded for further consideration in light of *White* of the partisan-activities clause. *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004) (vacated). We granted Appellants' request for en banc review, vacating the panel opinion. Today, we find that the partisan-activities and solicitation clauses also violate the First Amendment. Accordingly, we reverse the district court and remand the case with instructions to enter summary judgment in favor of Appellants.

The Supreme Court's remand requires us to consider two issues in light of *White*: the constitutional viability of the partisan-activities and solicitation clauses of Canon 5.[1]

In doing so, we give no deference to earlier panel opinions.

> [L]egal propositions which an appellate court settles on appeal ordinarily cannot be questioned again, ... A corollary to [this principle] is the rule that, upon a reversal and remand for further consistent proceedings, the case goes back . . . for a new determination of the issues presented as though they had not been determined before, pursuant to the legal principles enunciated in the appellate court's opinion, which must be taken as the law of the case.

Poletti v. C.I.R., 351 F.2d 345, 347 (8th Cir. 1965). Thus, our task is to take the "legal principles enunciated in" *White* and apply them to the partisan-activities and solicitation clauses for a determination of these claims "as though they had not been determined before." *Id.* And that is what we have done.

I. BACKGROUND

Canon 5A(1) and 5B(1), the partisan-activities clause, and B(2), the solicitation clause, rein in the political speech and association of judicial candidates in Minnesota. The partisan-activities clause states, in relevant part:

> Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:
>
> > (a) identify themselves as members of a political organization, except as necessary to vote in an election;
> >
> > . . . .

---

[1] Since our ruling today essentially moots any viable Fourteenth Amendment claims, we leave them for consideration on another day, if necessary.

> (d) attend political gatherings; or seek, accept or use endorsements from a political organization.

52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5, subd. A(1)(a), (d). Section 5B(1)(a) provides that "[a] judge or a candidate for election to judicial office may . . . speak to gatherings, *other than political organization gatherings*, on his or her own behalf."[2] *Id.* at subd. B(1)(a) (emphasis added). The solicitation clause states,

> A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Id. at subd. B(2).[3]

---

[2] Canon 5 defines "political organization" as "an association of individuals under whose name a candidate files for partisan office"—a political party. Canon 5, subd. D.

[3] The dissent notes that an Advisory Committee was involved in post-*White* amendments to Canon 5. Minn. Stat. § 480.052. The

The facts of this case demonstrate the extent to which these provisions chill, even kill, political speech and associational rights. In his 1996 bid for a seat as an associate justice of the Minnesota Supreme Court, appellant Gregory Wersal (and others working on his behalf) identified himself as a member of the Republican Party of Minnesota, attended and spoke at the party's gatherings, sought the endorsement of the party, and personally solicited campaign contributions. In response to Wersal's appearance at and speech to a Republican Party gathering, a complaint was filed with the Minnesota Lawyers Professional Responsibility Board, alleging that Wersal's actions violated Canon 5A(1)(d). Although the Minnesota Office of Lawyers Professional Responsibility (OLPR) ultimately dismissed the complaint, the complaint accomplished its chilling effect. Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race.

Wersal made a second bid for a seat on the Minnesota Supreme Court in 1998. In 1997 and 1998, Wersal asked the OLPR for advisory opinions regarding the solicitation and partisan-activities clauses. The OLPR's response was mixed, stating it would not issue an opinion regarding personal solicitation, in light of proposed amendments to the Canon and the fact that there were no judicial elections scheduled that particular year. It also stated that it would

---

Minnesota Supreme Court did make some amendments to Canon 5 to bring the provisions into line with the Supreme Court's "announce clause" ruling in *White*. But it should also be noted that the Advisory Committee recommended the deletion of parts of the partisan-activities clause of Canon 5 because the Committee believed, as do we, that it is not narrowly tailored. Several members of the Committee also noted, as do we, that the clause is impermissibly underinclusive because it applies only to political parties, and not to interest groups. The Minnesota Supreme Court was not responsive to these recommendations, and the partisan-activities and solicitation clauses at issue here are the same now as when this litigation was commenced.

enforce the partisan-activities clause. Wersal then initiated this litigation. In the meantime, he was forced to write several letters to individuals who had indicated they would speak on his behalf at Republican Party conventions across the state, asking them not to do so in order to avoid violating Canon 5 and imploring them to "[p]lease be patient. I hope for a decision from the Federal Courts soon." He also had his campaign's legal counsel advise the chairman of the Republican Party of Minnesota that Canon 5 would prohibit Wersal from accepting or using any endorsement from the party. There is no question that Wersal sought to work within the confines of Canon 5 even as he sought to challenge it—confines that in the most direct of ways restricted his political speech and association, compelling him at one point to end a political campaign.

II. DISCUSSION

A. Judicial Selection in Minnesota

Minnesota has chosen to elect the judges of its courts. Minn. Const. art. 6, § 7. "The fundamental law of this state is, and always has been, that the selection of judges must be submitted to the electors ...." *State ex rel. La Jesse v. Meisinger*, 258 Minn. 297, 103 N.W.2d 864, 866 (1960). Some thirty-three states employ some form of contested election for their trial courts of general jurisdiction, their appellate courts, or both. American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Jan. 2004). As federal judges, we confess some bias in favor of a system for the appointment of judges. Indeed, there is much to be said for appointing judges instead of electing them, perhaps the chief reason being the avoidance of potential conflict between the selection process and core constitutional protections. In promoting the newly drafted United States Constitution, Hamilton argued in *Federalist No. 78* that if the people were to choose judges through either an election or a process whereby electors chosen by the people would select them, the judges would harbor "too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws." *The Federalist No. 78*, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Arguably, concerns about judicial independence and partisan influence, posited by Minnesota as grounds for regulating judicial election speech, are generated, fundamentally, not by the exercise of political speech or association, but by concerns surrounding the uninhibited, robust and wide-open processes often involved in the election of judges in the first place. As Justice O'Connor noted in her *White* concurrence, "the very practice of electing judges undermines [an] interest" in an actual and perceived impartial judiciary. 536 U.S. at 788, 122 S.Ct. 2528.

Yet, there is obvious merit in a state's deciding to elect its judges, especially those judges who serve on its appellate courts. It is a common notion that while the legislative and executive branches under our system of separated powers make and enforce public policy, it is the unique role of the judicial branch to *interpret*, and be quite apart from making that policy.

But the reality is that "[t]he policymaking nature of appellate courts is clear." Michael R. Dimino, *Pay No Attention To That Man Behind the Robe: Judicial Elections, The First Amendment, and Judges as Politicians*, 21 Yale L. & Pol'y Rev. 301, 364 (2003) (citing Henry R. Glick, *Policy Making and State Supreme Courts, in The American Courts: A Critical Assessment* 87 (John B. Gates & Charles A. Johnson eds., 1991)); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 Cap. U.L. Rev. 583, 594 (2002) ("[It is a] myth that courts are apolitical and do not make policy. The Legal Realists exploded that myth and showed that judges do make policy. This is especially true of judges on states' highest courts."). Courts must often fill gaps created by legislation. And in particular, by virtue of what state appellate courts are called upon to do in the scheme of state government, they find themselves as a matter of course in a position to establish policy for the state and her citizens. "At the [state] appellate level, common-law functions such as the adoption of a comparative fault standard, or the determination of a forced spousal share of intestate property distribution, require a judiciary that is sensitive to the views of state citizens." Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 Tex. L. Rev. 1409, 1425 (1993). The courts' policy-making power is, of course, ever subject to the power of the legislature to enact statutes that override such policy. But that in no way diminishes the reality that courts are involved in the policy process to an extent that makes election of judges a reasonable alternative to appointment.

Without question, Minnesota may choose (and has repeatedly chosen) to elect its appellate judges. The very nature of its sovereignty within our federal system guarantees that. "[A] crucial axiom of our [federal form of] government [is that] the States have wide authority to set up their state and local governments as they wish." *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 795, 117 S.Ct. 1734, 138 L. Ed. 2d 1 (1997). Indeed, "[t]hrough the structure of its government ... a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L. Ed. 2d 410 (1991). Of course, that power of state self-determination is not boundless. "[It is an] axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject ... to limitations imposed by the Supremacy Clause." *Id.* at 457, 111 S.Ct. 2395. The Supremacy Clause provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. U.S. Const. art. VI, cl. 2. When a state engineers its governmental structure or processes in a way that curtails liberties guaranteed by the Constitution, that presumption of state self-determination is replaced, in this case, by a careful—even critical—judicial inquiry fashioned by the particular liberty at issue. If Minnesota sees fit to elect its judges, which it does, it must do so using a process that passes constitutional muster.

B. The First Amendment and Political Speech

Within this context, Minnesota has enacted Canon 5 in an effort to regulate judicial elections. In *White*, the Court held the announce clause of Canon 5, which prohibits judicial candidates from stating their views on disputed legal issues, unconstitutional. It falls to us now to determine whether the partisan-activities and solicitation clauses of Canon 5 are acceptable under the First Amendment.

The First Amendment commands that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. Freedom of association is inherently a part of those liberties protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976) ("The First Amendment protects political association as well as political expression."). If it were not so, many of the Amendment's guarantees would ring hollow.

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed .... Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L. Ed. 2d 462 (1984) (citation omitted). The due process clause of the Fourteenth Amendment makes the First Amendment applicable to the states. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 131 L. Ed. 2d 426 (1995).

Protection of political speech is the very stuff of the First Amendment. "'[I]t can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15, 96 S.Ct. 612 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L. Ed. 2d 35 (1971)). That is because our constitutional form of government not only was borne of the great struggle to secure such freedoms as political speech, but also because such freedom helps assure the continuance of that constitutional government. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Id.* at 14-15, 96 S.Ct. 612.

It cannot be disputed that Canon 5's restrictions on party identification, speech to political organizations, and solicitation of campaign funds directly limit judicial candidates' political speech. Its restrictions on attending political gatherings and seeking, accepting, or using a political organization's endorsement clearly limit a judicial candidate's right to associate with a group in the electorate that shares common political beliefs and aims.

C. The Strict Scrutiny Framework

Political speech—speech at the core of the First Amendment—is highly protected. Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it. *McIntyre*, 514 U.S. at 347, 115 S.Ct. 1511.

The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest.[4] *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L. Ed. 2d 271 (1989); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L. Ed. 2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Strict scrutiny is an exacting inquiry, such that "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L. Ed. 2d 5 (1992).

1. The Requirement of a Compelling State Interest

Precisely what constitutes a "compelling interest" is not easily defined. Attempts at definition generally use alternative, equally superlative language: "interest[ ] of the highest order," "overriding state interest," "unusually important interest." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L. Ed. 2d 15 (1972); *McIntyre*, 514 U.S. at 347, 115 S.Ct. 1511 (1995); *Goldman v. Weinberger*, 475 U.S. 503, 530, 106 S.Ct. 1310, 89 L. Ed. 2d 478 (1986) (O'Connor, J., dissenting); *see* David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 Fla. L. Rev. 483, 498 (2004) ("The concept of a compelling governmental interest is deceptively self-evident. Its own words define it. It is an interest that is compelling, or extremely important, or of the 'first order.'"). And "[n]owhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a 'legitimate' state interest, [compelling or otherwise]." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 181, 92 S.Ct. 1400, 31 L. Ed. 2d 768 (1972) (Rehnquist, J., dissenting). In addition, few of the Court's cases explain what makes a state interest "compelling." But some general guides can be deduced from what the Court has said. Some opinions have found an interest compelling based on policy grounds.[5] Others have found a basis in "the realization of constitutional guarantees." *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 932-37 (1988) (collecting cases).

---

[4] The strict scrutiny test contrasts with those inquiries used for speech not at the core of the First Amendment, "commensurate with [such speech's] subordinate position in the scale of First Amendment values," *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L. Ed. 2d 541 (1995), or for regulations which only incidentally burden speech, *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968). So-called "intermediate scrutiny" is applied to restrictions of commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L. Ed. 2d 341 (1980).

A regulation that restricts free speech only incidentally will be upheld, under the *O'Brien* test, if (1) it is within the constitutional power of Congress or the legislature to enact it, (2) it furthers an important or substantial governmental interest, (3) the regulation is unrelated to suppressing free expression, and (4) its restriction of speech is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673. And some "narrowly limited classes" of speech enjoy no First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." *Id.* at 572, 62 S.Ct. 766.

---

[5] Some of those policies have included apprehending highly mobile criminal suspects, deterring murder, avoiding the harms of illicit drugs, realizing consumer benefits in licensing requirements for professionals, and upholding the administration of justice. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 935 n. 85 (1988) (collecting cases).

In general, strict scrutiny is best described as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest. As one commentator has said, "the Court's treatment of governmental interests has become largely intuitive, a kind of 'know it when I see it' approach." *Id.* at 937. Such an analysis requires, first, a clear understanding of what the state's interest may be. "Clarity on this point is essential before we can decide whether [the purported interest] is indeed a compelling state interest . . . ." *White*, 536 U.S. at 775, 122 S.Ct. 2528.

The inquiry of whether the interest (the end) is "important enough"—that is, sufficiently compelling to abridge core constitutional rights—is informed by an examination of the regulation (the means) purportedly addressing that end. A clear indicator of the degree to which an interest is "compelling" is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being "compelling." If an interest is *compelling* enough to justify abridging core constitutional rights, a state will enact regulations that substantially protect that interest from similarly significant threats. As expressed in *White*: "'[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id.* at 780, 122 S.Ct. 2528 (first alteration in original) (quoting *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring)).[6] *Accord City of Ladue v. Gilleo*, 512 U.S. 43,

---

[6] The teachings of *Florida Star* make it clear that where a law is underinclusive to such a degree that the stated interest is not mean-

52-53, 114 S.Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place."); *Florida Star*, 491 U.S. at 540, 109 S.Ct. 2603 ("[T]he facial underinclusiveness [of a speech regulation] raises serious doubts about whether [the state] is, in fact, serving . . . the significant interests [it articulates]."); *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L. Ed. 2d 263 (1980) (finding purported interest in residential privacy not truly compelling where a picketing statute prohibited peaceful picketing in general, but not peaceful *labor* picketing, in residential neighborhoods); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 n. 27, 96 S.Ct. 2440, 49 L. Ed. 2d 310 (1976) ("If some groups are exempted from a prohibition [purported to uphold a state interest], the rationale for regulation is fatally impeached.") (quotation omitted).

2. The Need for Narrow Tailoring

Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. *Eu*, 489 U.S. at 222, 109 S.Ct. 1013. As with the compelling interest determination, whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative). *See id.* at 226, 228-29, 109

---

ingfully protected, a state's claim that the interest is vital enough to abridge core constitutional rights is substantially attenuated. 491 U.S. at 541-42, 109 S.Ct. 2603 (Scalia, J., concurring).

S.Ct. 1013 (evaluating the degree to which the regulation in question advanced the stated interest at all); *Buckley*, 424 U.S. at 45-47, 96 S.Ct. 612 (same); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n. *, 112 S.Ct. 501, 116 L. Ed. 2d 476 (1991) (stating that a regulation is not narrowly tailored if it is overinclusive); *Florida Star*, 491 U.S. at 540, 109 S.Ct. 2603 (holding that the underinclusiveness of a statute raises "serious doubts" about whether the statute actually serves the state's purported interest); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74, 110 S.Ct. 2729, 111 L. Ed. 2d 52 (1990) (finding that a less restrictive means was available to advance the state's interest); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262, 107 S.Ct. 616, 93 L. Ed. 2d 539 (1986) (same); *Florida Star*, 491 U.S. at 538, 109 S.Ct. 2603 (same); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417 (collecting cases). In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible.

D. Minnesota's Purported Compelling State Interest

In *Kelly*, Minnesota argued that Canon 5's restrictions on judicial candidate speech served a compelling state interest in maintaining the independence, and the impartiality, of the state's judiciary. Minnesota continues to argue that judicial independence, as applied to the issues in this case, springs from the need for impartial judges. Apparently, the idea is that a judge must be independent of and free from outside influences in order to remain impartial and to be so perceived. Thus, in *Kelly*, the panel majority understood the two notions, independence and impartiality, to be interchangeable,[7] as the Supreme Court

---

[7] In their supplemental brief to the en banc court, Appellees attempt to resurrect from earlier arguments to the court a notion of

---

"independence," separate and distinct from "impartiality," that seeks to maintain real and apparent separation of the judiciary from political influences as a compelling state interest. The partisan-activities clause in particular, they argue, serves this interest by "ensur[ing] that the public views the judiciary as being independent of the strong political influences that pervade legislative and executive branch elections and continue to strongly influence legislative and executive branch decisions thereafter." Supplemental Br. on Remand of Defendants-Appellees at 10. This argument, however, falls prey to the same inherent underinclusiveness of Canon 5 that we discuss, *post* at 759-60 [33a-35a], with regard to its regulation of activities that concern only political parties.

We note that Appellees fret over the kind of influence political parties have in not only elections, but also governmental decisions made thereafter. This case, however, is not about what happens after an election. And in whatever measure this concern is addressed to political parties, it must equally apply to interest groups. By way of illustration using the legislative context Appellees mention, it is likely that the AFL-CIO concerns itself just as much as do the political parties with who chairs the legislative committees dealing with labor matters. And Minnesota's bar associations and trial lawyer associations almost certainly express as much interest as do the political parties in who leads the judiciary committees. While the record does not discuss this point, it is an unavoidable political reality. The essential point is that treating political parties differently than interest groups lies at the heart of the underinclusiveness problem in this case. Such underinclusiveness bedevils any claim that "independence" is a compelling state interest because consorting with politically active interest groups—certainly a source of equally worrisome potential for influence or the appearance of influence—is not regulated at all, as we discuss in more detail, *post* at 759-60 [33a-35a]. Thus, we proceed under Minnesota's original interchangeable use of "impartiality" and "independence."

The Minnesota Supreme Court's refusal to adopt the recommendations of its Advisory Committee discussed in footnote 3, *ante* at 745-46 [7a-8a], seems to have prompted the dissent to advance yet another previously unrecognized and unprecedented definition of judicial independence—a separation of powers theory. The Minnesota Supreme Court said,

> [T]he separation of powers inherent in the creation of three distinct branches of government, one of which is the judicial branch,

> in article III, section 1 of the Minnesota Constitution provides the constitutional underpinning for the *independence* of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.

In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 4 (Minn. Sept. 14, 2004) (emphasis added).

Our opinion recognizes, citing *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L. Ed. 2d 410 (1991), the right of a state to organize its government and to provide for separation of powers in its governmental structure. *Ante* at 747-48 [11a-12a]. We also recognize the Supremacy Clause of the Constitution and the requirement that state action may not violate the Constitution-including the First Amendment. *Id.*

There are, however, at least two other basic frailties to the dissent's arguments regarding Minnesota's interest in any separation of powers. First, neither the Supreme Court, nor any other court that we could find, has ever determined that a state's interest in maintaining a separation of powers is sufficiently compelling to abridge core First Amendment freedoms. While the dissent states that a separation of powers is a basic concept in Minnesota's constitution, the right to free political speech and association guaranteed by the First Amendment to the United States Constitution is no less basic a concept. Indeed, First Amendment rights are even more fundamental. The right to free and open elections undergirds the framework of government established by any constitution, state or federal. Second, nothing in our opinion or the remedies sought by Appellants serve to further blur any existing lines between the judicial, legislative and executive branches of Minnesota state government. Rather, it is the actions of the Minnesota Supreme Court in adopting Canon 5 that have, in fact, taken the courts into what the dissent describes as the "political branches" of government and compromised any separation of powers framework established by Minnesota's constitution.

Though the Minnesota constitution allows the legislature to provide for disciplining judges, and the state legislature has given the Minnesota Supreme Court the authority to censure or remove judges and to promulgate rules of *conduct for lawyers*, through Canon 5, and without apparent constitutional or statutory authority, the Minnesota Supreme Court has stepped into the legislative arena in promptly noted in *White*, 536 U.S. at 775 n. 6, 122 S.Ct. 2528. In *Kelly*, the panel majority analyzed the announce, partisan-activities, and solicitation clauses in light of impartiality as a compelling interest, but failed to define "impartiality." On appeal, the Supreme Court filled that void by fleshing out its meaning. Justice Scalia reasoned that impartiality in the judicial context has three potential meanings.

One possible meaning of "impartiality" is a "lack of preconception in favor of or against a particular *legal view*." *Id.* at 777, 122 S.Ct. 2528. Quickly discounting this uncommon use of the word, the Court said it could not be a compelling interest for a judge to "lack . . . predisposition regarding the relevant legal issues in a case" because such a requirement "has never been thought a necessary component of equal justice." *Id.* The Court reasoned, first, that it is "virtually impossible" to find a judge who lacks any "preconceptions about the law," and second, that it would not be desirable to have such a judge on the bench. *Id.* "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Id.* at 778, 122 S.Ct. 2528 (quotation omitted). We follow the Court's direction and likewise dismiss the idea that this meaning of impartiality could be a compelling state interest.

---

an attempt to regulate the political climate of statewide elections, an authority seemingly granted only to the Minnesota legislature under its plenary powers. Minn. Const. art. 6, § 9; Minn. Stat. § 490.16; Minn. Stat. § 480.05. See Minn. Stat. §§ 200.01 *et seq.* (Minnesota legislature's enactments regarding statewide elections). Indeed, without any stated or readily discernible authority whatsoever, the Canon writes political parties out of statewide judicial elections and allows other political interests to fully participate in a totally unregulated manner.

A second possible meaning is a "lack of bias for or against either *party* to [a] proceeding." *Id.* at 775, 122 S.Ct. 2528. Calling this the traditional understanding of "impartiality" and the meaning used by Minnesota and amici in their due process arguments, the Court explained that this notion "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776, 122 S.Ct. 2528. The Court implied, and we find it to be substantially evident, that *this* meaning of impartiality describes a state interest that is compelling. It can hardly be argued that seeking to uphold a constitutional protection, such as due process, is not per se a compelling state interest. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-315, 98 S.Ct. 2733, 57 L. Ed. 2d 750 (1978) (recognizing the First Amendment as a basis for a compelling state interest). And the rule laid down in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), makes clear that the partiality of a judge as it relates to a party to a case violates due process protections: "[I]t certainly violates the Fourteenth Amendment, and deprives [a person] of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523, 47 S.Ct. 437. In *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997), the Court reiterated that "the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Id.* at 904-05, 117 S.Ct. 1793 (quotation and citation omitted). *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25, 106 S.Ct. 1580, 89 L. Ed. 2d 823 (1986) (citing *Tumey*); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-16, 91 S.Ct. 1778, 29 L. Ed. 2d 423 (1971) (per curiam) (holding that due process was violated where a judge presided in a case involving a party who had successfully sued him earlier. "Trial before 'an unbiased judge' is essential to due process."); *In re Murchison*, 349 U.S. 133, 137-39, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (holding that due process was violated by a judge presiding over both the indictment, under a special "judge-grand jury" procedure in Michigan, and trial of a criminal defendant).

Being convinced that protecting litigants from biased judges is a compelling state interest, we turn to the "narrow tailoring" examination of the partisan-activities clause under this particular meaning of judicial impartiality. Because this meaning directs our attention to parties to the litigation rather than to ideas and issues, we analyze the regulation in this context before turning to other possible definitions of impartiality. We consider whether the partisan-activities clause actually addresses this compelling state interest and, if so, whether it is the least restrictive means of doing so.

In *White*, the Supreme Court found that the announce clause failed the narrow tailoring aspect of the strict scrutiny test, holding "[i]ndeed, the clause is barely tailored to serve that [lack of bias] interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *White*, 536 U.S. at 776, 122 S.Ct. 2528. Thus, the Court found that clause was not narrowly tailored because it failed to advance a compelling interest. The same is true for the partisan-activities clause.

3. Unbiased Judges and the Narrow Tailoring of the Partisan-Activities Clause

In one sense, the underlying rationale for the partisan-activities clause—that *associating with a particular group* will destroy a judge's impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality. Canon 5, in relevant part, forbids a judicial candidate from identifying with a political organization, making speeches to a political organization, or accepting endorsements from or even attending meetings of a political organization, all of which are the quintessence of political associational activity. And beyond its importance in bringing about those rights textually protected by the First Amendment, association, as earlier noted, is itself an important form of speech, particularly in the political arena. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56, 120 S.Ct. 2446, 147 L. Ed. 2d 554 (2000) (holding that the Boy Scouts had a First Amendment right to send a particular message based on the individuals it allowed to be associated with the organization as scoutmasters); *Eu*, 489 U.S. at 223, 109 S.Ct. 1013 ("[T]he First Amendment has its fullest and most urgent application to speech ... during a campaign for political office.") (quotation omitted). Indeed, Minnesota argues that a party label is nothing more than shorthand for the views a judicial candidate holds. Br. of Appellee The Hon. Charles Flinn, Jr. at 30. Inasmuch, then, as the partisan-activities clause seeks, at least in part, to keep judges from aligning with particular views on issues by keeping them from aligning with a particular political party, the clause is likewise "barely tailored" to affect any interest in impartiality toward parties. Thus, the Supreme Court's analysis of the announce clause under this meaning of "impartiality," to wit judicial bias, is squarely applicable to the partisan-activities clause.

> To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, [be that through *announcing* or *aligning with* particular views,] the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely

> to lose. The judge is applying the law (as he sees it) evenhandedly.

White, 536 U.S. at 776-77, 122 S.Ct. 2528.

We recognize that the difference between the direct expression of views under the announce clause and expressing a viewpoint under the partisan-activities clause through association, is that the latter requires the aligning of one's self with other like-minded individuals—that is, the members of a political party.

Political parties are, of course, potential litigants, as they are in this case. Thus, in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in favor of that litigant. Yet even then, any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party. That is because the associational activities restricted by Canon 5 are, as we have pointed out, part-and-parcel of a candidate's speech for or against particular *issues* embraced by the political party. And such restrictions, we have also said, do not serve the due process rights of *parties*. In the case of a political party involved in a redistricting dispute, for example, the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an "R" or "D," or "DFL" (denoting Minnesota's Democratic–Farmer–Labor Party) after his or her name. *See Minn. State Bar Ass'n v. Divorce Educ. Assocs.*, 300 Minn. 323, 219 N.W.2d 920, 922 (1974) (holding that in civil action brought by state bar association seeking injunction against individuals for unauthorized practice of law, membership in the same bar association would not in itself disqualify a judge from hearing the case on a theory the judge was "impliedly biased"). Thus, the partisan-activities clause does not advance an interest in impartiality toward litigants in a case where, without more, it is a like-minded political party which is one of the litigants.

And in those political cases where a judge is more personally involved, such as where the redistricting case is a dispute about how to draw that judge's district, and even in those cases discussed above that merely involve a political party as a litigant, recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case. Through recusal, the same concerns of bias or the appearance of bias that Minnesota seeks to alleviate through the partisan-activities clause are thoroughly addressed without "burn[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 1 L. Ed. 2d 412 (1957). Indeed, Canon 3 of the Minnesota Code of Judicial Conduct provides that a judge is to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 3, subd. D(1). Section (a) of the statute in particular addresses Minnesota's goals, providing that a judge should recuse himself where "the judge has a personal bias or prejudice concerning a party." Concern about the mere *appearance* of bias is also addressed by recusal. *See In re Collection of Delinquent Real Prop. Taxes*, 530 N.W.2d 200, 206 (Minn. 1995) (holding that "[t]he controlling principle is that no judge . . . ought ever to [hear] the cause of any citizen, *even though he be entirely free from bias in fact*, if circumstances have arisen which give a bona fide appearance of bias to litigants.").

Therefore, the partisan-activities clause is barely tailored at all to serve any interest in unbiased judges, and, at least, is not the least-restrictive means of doing so. Accordingly, it is not narrowly tailored to any such interest and fails under strict scrutiny.

4. Impartiality Understood as "Openmindedness," and the Partisan-Activities Clause

The third possible meaning of "impartiality" articulated by the Supreme Court in *White*, and the one around which its analysis of the announce clause revolved, was "described as openmindedness." *White*, 536 U.S. at 778, 122 S.Ct. 2528. The Court explained,

> This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.

Id. The Court stopped short, however, of determining whether impartiality articulated as "openmindedness" was a compelling state interest because it found that, even if it were, the "woeful[ ] underinclusive[ness]" of the clause betrayed any intended purpose of upholding openmindedness. *Id.* at 780, 122 S.Ct. 2528.

We conclude that the partisan-activities clause is likewise "woefully underinclusive," calling into question its validity in at least two ways. First, it leads us to conclude, before even reaching a compelling interest inquiry, that like the announce clause, the partisan-activities clause was not adopted for the purpose of protecting judicial openmindedness. Second, under a compelling interest analysis, the clause's underinclusiveness causes us to doubt that the interest it purportedly serves is sufficiently compelling to abridge core First Amendment rights. We conclude that the underinclusiveness of the partisan-activities clause causes it to fail strict scrutiny.[8]

---

[8] The dissent expands the Supreme Court's articulation of judicial "openmindedness" in *White* by importing an "anti-corruption" ele-

ment from *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976), *post* at 768-69 [51a]. But, *Buckley* is a case involving the regulation of the size, source and use of political contributions. It does not deal with the direct suppression of core political speech and association at issue in this case. And, there is nothing in the record that supports the interposition of the anti-corruption concerns advanced by the dissent.

The dissent also-seeks to insert anti-corruption arguments discussed in *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L. Ed. 2d 491 (2003), yet another political contributions case, into the candidate speech and association issues before us today. However, the Supreme Court, in *McConnell*, did not once cite *White* in the entirety of its 251-page opinion dealing with the corrupting influence of "soft" money and the political communications such money can buy. In addressing the legislation at issue in *McConnell*, the Supreme Court noted that the Bipartisan Campaign Reform Act of 2002 "regulates the use of soft money [as defined in the opinion] by political parties, office holders, and candidates." 540 U.S. at 132, 124 S.Ct. 619. The Court further states that the Act, "primarily prohibits corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections." *Id.* Neither *Buckley* nor *McConnell* is a strict scrutiny case, though the dissent acknowledges that strict scrutiny applies in this case. *See post* at 73 [77a] n. 22. As stated in *McConnell*, "'there is no place [in this "soft money" case] for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny."'" 540 U.S. at 137, 124 S.Ct. 619 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400, 120 S.Ct. 897, 145 L. Ed. 2d 886 (2000)). In keeping with this, the Court applied a "less rigorous [than strict scrutiny] standard of review." *Id.* And *McConnell*'s one paragraph review of an underinclusiveness argument did not lay out any rule applicable to this case. The Court in *White* gave us the rule: "'[A] law cannot be regarded as protecting an interest of the *highest order*, and thus as justifying a restriction upon ... speech, when it leaves appreciable damage to that *supposedly vital interest* unprohibited.'" 536 U.S. at 780, 122 S.Ct. 2528 (emphasis added) (first alteration in original) (quoting *Florida Star*, 491 U.S. at 541-42, 109 S.Ct. 2603 (Scalia, J., concurring)). In *Buckley*, the Court explained the use of two differing standards of review to governmentally imposed restrictions on election-related activities. The Court ana-

a. Underinclusiveness Belies Purported Purpose

Underinclusiveness in a regulation may reveal that motives entirely inconsistent with the stated interest actually lie behind its enactment. *See id.* at 779, 122 S.Ct. 2528 (noting that the underinclusiveness of the announce clause "is quite incompatible with the notion that the need for openmindedness .... lies behind the prohibition at issue here"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L. Ed. 2d 854 (1989) (stating, in an equal protection case, "[i]ndeed, the purpose of strict scrutiny is to 'smoke out' illegitimate [purposes] .... The

---

lyzed campaign contributions, and their reasonable limitations, under a "sufficiently important interest" standard that asked whether the limitations were "closely drawn to avoid unnecessary abridgement of [political] freedoms." 424 U.S. at 25, 96 S.Ct. 612. And where the Court actually discussed rights similar to those at issue in this case, it imposed "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45, 96 S.Ct. 612. In fact, the Court stated clearly what we must keep in mind today:

> [A] candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known [and associate with like-minded persons] so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country public discussion is a political duty, applies with special force to candidates for public office.... [T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak [or associate] without legislative limit on behalf of his own candidacy.

Id. at 52-54, 96 S.Ct. 612 (quotation omitted).

In sum, *Buckley* and *McConnell* do not support an underinclusive or incremented approach to "strict scrutiny" analysis and the teachings of these cases do not support the dissent's position to the contrary.

test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was [something inconsistent with the interest]."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L. Ed. 2d 313 (1985) (finding that the underinclusiveness of a zoning regulation betrayed the city's purported interests in, *inter alia*, not locating housing in a flood plain, not being legally responsible for the actions of its occupants, assuring adequate square footage per occupant, and lessening residential and street congestion); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793, 98 S.Ct. 1407, 55 L. Ed. 2d 707 (1978) (finding that the underinclusiveness of a regulation "undermines the likelihood of a genuine state interest" in the purported goal). In *White*, the Court found that, "as a means of pursuing the objective of openmindedness ... the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *White*, 536 U.S. at 780, 122 S.Ct. 2528. The underinclusiveness manifests itself in the inherently brief period of speech regulation during a political campaign relative to the many other instances in which a judicial candidate, especially an incumbent who is a candidate, has an opportunity to speak on disputed issues. The Court reasoned that if the purpose of the announce clause were truly to assure the openmindedness of judges, Minnesota would not try to address it through a regulation that restricted speech only during a campaign since candidates' views on contentious legal issues can be and are aired in the many speeches, class lectures, articles, books, or even court opinions given or authored before, during or after any campaign.

The same is true of the partisan-activities clause. The announce clause bars a judicial candidate from stating his views on disputed issues though "he may say the very same thing ... up until the very day before he declares himself a candidate." *Id.* at 779, 122 S.Ct. 2528. The partisan-activities clause bars a judicial candidate from associative activities with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for nonjudicial offices) up until the day he begins his run for a judicial seat. A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness. The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity. And, history indicates it will be rare that a judicial candidate for a seat on the Minnesota Supreme Court will not have had some prior, substantive, political association. In sum, restricting association with a political party only during a judicial campaign, in supposed pursuit of judicial openmindedness, renders the partisan-activities clause "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Id.* at 780, 122 S.Ct. 2528.

As for the appearance of impartiality, the partisan-activities clause seems even less tailored than the announce clause to an interest in openmindedness. While partisan activity may be an indirect indicator of potential views on issues, an affirmative enunciation of views during an election campaign more directly communicates a candidate's beliefs. If, as the Supreme Court has declared, a candidate may *speak* about her views on disputed issues, what appearance of "impartiality" is protected by keeping a candidate from simply *associating* with a party that espouses the same or similar positions on the subjects about which she has spoken? Moreover, even if there were some system in which it would make sense to allow one but not the other in pursuit of the same goal, cabining a candidate from a political party for the relatively short duration of a campaign would add nothing to an appearance of impartiality. Given this "woeful underinclusiveness" of the partisan-activities clause, it is apparent that advancing judicial openmindedness is not the purpose that "lies behind the prohibition at issue here."[9] *Id.* at 779, 122 S.Ct. 2528.

---

[9] Rather, the fruits of Canon 5 appear to bear witness to its remarkably pro-incumbent character.

In 2004, of the three Minnesota Supreme Court seats up for election, only one was contested. (Originally, two seats were contested, but a challenger was disqualified.) Minnesota Lawyer, Judicial Elections 2004 (2004), at http://www.minnlawyer.com/elections/2004/uncontested.cfm (last visited Feb. 10, 2005). In the race that was contested, the incumbent enjoyed a nearly thirty-two percent margin in contributions from outside, non-loan sources. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2004). The data from the Minnesota Court of Appeals is even more striking. Of the five Court of Appeals seats up for election, only two were contested. Minnesota Lawyer, Judicial Elections 2004 (2004), at http://www.minnlawyer.com/elections/2004/uncontested.cfm (last visited Feb. 10, 2005). In those two races, the incumbents were able to collect a combined total of $104,172.21 in contributions against a combined challengers' total of just $4,546.46-nearly twenty-three times as much. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2004).

In 2000, Supreme Court incumbents raised a combined $505,120.66. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2000). Only two of the challengers raised enough money to trigger disclosure. Their combined total was $23,582.67. *Id.*

Notably, donations from lawyers and law firm-related political funds account for a substantial portion of incumbents' re-election war chests. In one 2004 Court of Appeals race, such contributions accounted for over forty-three percent of the incumbent's total campaign funds. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2004). In the 2004 Supreme Court race, they made up over half of the incumbent's funds. *Id.*

b. Underinclusiveness Betrays "Compelling" Claim

While it is not necessary for us to reach the question of whether judicial openmindedness as defined in *White* is sufficiently compelling to abridge core First Amendment rights, we note that the underinclusiveness of Canon 5's partisan activities clause clearly establishes that the answer would be no. Whether Minnesota asserts a compelling state interest in judicial openmindedness is substantially informed by the fit between the partisan-activities clause and the purported interest at stake. A clear indicator of the compelling nature of an interest is whether the state has bothered to enact a regulation that guards the interest from all significant threats.

We are guided on remand by the law enunciated in *White*, and the Court's words bear repeating: "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech. when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 780, 122 S.Ct. 2528 (quotation omitted). By its own terms, Canon 5's restrictions on association with "political organizations" apply only to "association[s] of individuals under whose name a candidate files for partisan office"—political parties. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5, subd. D. Yet, if mere association with an organization whose purpose is to advance political and social goals gives Minnesota sufficient grounds to restrict judicial candidates' activities, it makes little sense for the state to restrict such activity only with political parties. There are numerous other organizations whose purpose is to work at advancing any number of similar goals, often in a more determined way than a political party. Minnesota worries that a judicial candidate's consorting with a political party will damage that individual's impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party's policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the constitutional, legislative, public policy and procedural beliefs of organizations such as the National Rifle Association (NRA), the National Organization for Women (NOW), the Christian Coalition, the NAACP, the AFL-CIO, or any number of other political interest groups. While Minnesota expresses doubt that the influence an interest group can have over a candidate is comparable to that of a political party, the record in this case refutes the premise.[10] Indeed, associating with an interest group, which by design is usually more narrowly focused on particular issues, conveys a much stronger message of alignment with particular political views and outcomes. A judicial candidate's stand, for example, on the importance of the right to keep and bear arms may not be obvious from her choice of political party. But, there can be little doubt about her views if she is a member of or endorsed by the NRA. Yet Canon 5 is completely devoid of any restriction on a judicial candidate attending or speaking to a gathering of an interest group; identifying herself as a member of an interest group; or seeking, accepting, or using an endorsement from an interest group. As a result, the partisan-activities clause unavoidably leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited, and thus Minnesota's argument that it protects an interest of the highest order fails.[11]

---

[10] The record informs us of activity on the part of the League of Women Voters to publish a voter's guide regarding candidates and their views; the Minnesota Family Council urging Minnesotans to join the fight to defend traditional Judeo-Christian values; *Lavender Magazine*, which describes its readership as including the politically active gay-lesbian-bisexual-transgender community, providing a voter's guide; the Minnesota Women Lawyers, whose mission is to pursue equal participation for women in the legal profession, seeking to endorse judicial candidates for office; People for Responsible Government, a group interested in the accountability of government to the people, holding a forum on judicial reform issues; and the state and local bar associations.

---

[11] The dissent appears to assert a newly minted state interest described as "protecting the judicial process from extraneous coercion." *Post* at 767 [47a]. Although the dissent claims that such interest "has been recognized as compelling," *id.*, it cites no precedent for the proposition and we have found none. Neither does the dissent flesh out the nature and source of this purported "coercion." While it argues that political parties are the source of such coercion, we find no evidence in the record to support that. And the dissent does not include political interest groups in its concern about coercion, notwithstanding such groups' many well documented forays into judicial selection matters.

While the dissent is concerned about political party involvement in judicial selection, state law itself inculcates partisan interests into the process. For example, when a justice of the Minnesota Supreme Court resigns shortly before the end of a term of office, a practice widely followed in Minnesota for many years, the governor, who is selected on a partisan ballot and is usually considered the current head of his or her party, selects and appoints a successor who is almost always a member of the governor's own party. Minn. Const. art. 6, § 8. Published history shows that these patronage-propounded selectees are often, if not always, former partisan office holders or party activists. The political appointee then serves a term that lasts until the next general election occurring more than one year after the appointment. *Id.* Through this device, the gubernatorial designee is able to stand for election on the non-partisan judicial ballot ostensibly as an incumbent office holder, fully protected by Canon 5 from the rigors of a constitutionally sound political exercise. Indeed, all but one of the present members of the high court and twenty-three of the last twenty-five Supreme Court Justices ascended to the Minnesota bench in this manner. Minnesota State Law Library Docket Series: Chronological List of Justices and Judges of the Minnesota Appellate Courts (2005), at http://www.lawlibrary.state.mn.us/judges.html (last visited June 6, 2005). This partisan involvement in judicial selection, fully sanctioned by the Minnesota constitution, is direct and personal and filtered not at all by the ballot box.

c. Underinclusiveness Not Indicative of a Legitimate Policy Choice

The panel majority in *Kelly* did not find the underinclusiveness of the partisan-activities clause troublesome. It viewed it as a legitimate policy choice: "when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment." *Kelly*, 247 F.3d at 872. Association with political parties, goes the argument, is a greater threat to judicial openmindedness than association with interest groups because political parties have more power "to hold a candidate in thrall."[12] *Id.* at 876. But to determine whether Minnesota has shown that association with political parties poses a greater menace to judicial openmindedness than association with other political interest groups, it is necessary to do at least some analysis of the two supposed threats. While the opinion in Kelly purports to examine the "threat" posed by political parties, it contains no discussion of any comparable danger advanced by association with special interest groups, despite ample record evidence that suggests the influence of these special groups is at least as great as any posed by political parties.[13]

---

[12] The panel majority in *Kelly* reasoned that treating political parties differently from interest groups is further justified given political parties' "powerful machinery," including a large membership, to enforce adherence to their views. 247 F.3d at 876. The majority also concluded different treatment was called for "because political parties have comprehensive platforms," and thus "obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues." *Id.* Yet, this does not account for the regulation of those Minnesota political parties that have a more limited membership, or that limit their focus to only a few issues, including the Constitution Party, the Natural Law Party, and the Green Party. Canon 5's oversight of these parties calls into question the asserted "powerful machinery" and "comprehensive platform" rationales for regulating political parties but not interest groups, and exposes the fact that, arbitrarily, it is the mere designation of a group as a "political party" that invokes Canon 5's regulation.

---

[13] For instance, in testimony before the Minnesota Supreme Court in 1997 regarding proposed amendments to Canon 5, the Honorable Gary J. Meyer, Chief Judge of Minnesota's Tenth Judicial District, testified that his assignment area passed a resolution supporting amending section 5D—the definition of "political organization"—to "include not just political parties but all organizations, . . . though not individuals, which endorse candidates for elected office." Hearing on the Amendment to Canon 5 of the Code of Judicial Conduct, C7-81-300, Tr. at 36 (Minn. Nov. 19, 1997). Judge Meyer pointed out that, regarding Minnesota's purported concern about keeping partisanship out of judicial campaigns, "you do not take partisan politics out of a judicial election simply by excluding support from political parties." *Id.* His testimony highlighted the same concerns we raise here today:

> The definition of political organization in Paragraph D effectively . . . limits the term [to] "political parties." It [thereby] allows a candidate for the judiciary to seek and use the endorsements of such special interest groups as the National Rifle Association, the Minnesota Citizens Concerned for Life, the National Organization for Women, Mothers Against Drunk Drivers, or any labor union. Clearly, organizations such as these can and frequently do support and oppose candidates for political office. . . . It appears that the proposed changes to Canon 5 are an attempt to strip political affiliation from judicial elections, but at the same time, they allow and perhaps encourage candidates to adopt issue group affiliation. This doesn't take party politics out of the judicial election. . . . [I]f you're going to exclude one, why not exclude them all? It seems to me that it doesn't make a . . . judicial election any less political. . . . I question why it's appropriate to deny a judge the ability to have literature distributed with his or her political party while at the same time allow an opponent to seek MCCL [Minnesota Citizens Concerned for Life] support and distribution of their literature endorsing the opponent in church parking lots on the Sunday before the election. Is it fair for a judge who supported a no guns peace policy within his or her political party to not be able to seek the help of that party against an opponent who seeks and uses the NRA mailing list for an endorsement? Why should a judicial candidate be able to solicit labor union support and eventually its sam-

Minnesota has simply not met its heavy burden of showing that association with a political party is so much greater a threat than similar association with interest groups, at least with evidence sufficient for the drawing of a constitutionally valid line between them. As a result, cases granting some degree of deference to legislatures who seek to attack one form of a problem before addressing another form are not applicable here. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L. Ed. 2d 125 (1975) (relying on *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)).

To the contrary "the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." *Ladue*, 512 U.S. at 51, 114 S.Ct. 2038. While the Court in *Erznoznik* stated in dictum that underinclusive classifications may be upheld, "on the sound theory that a legislature may deal with one part of a problem without addressing all of it," it was quick to add that "[t]his presumption of statutory validity, however, ... has less force when a classification turns on the subject matter of expression." *Erznoznik*, 422 U.S. at 215, 95 S.Ct. 2268. Just as the Court did in *Erznoznik*, we reject the argument that the underinclusive regulation is valid. "'[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L. Ed. 2d 212 (1972)). As we have noted,

---

> ple ballot, but not ... the support of the political party for which he or she worked for many years? Is it appropriate for a judicial candidate to speak and appear at a MADD, Mothers Against Drunk Drivers, function but not [at] a political party [function]? Why should these special interest endorsements and activity be protected as constitutionally guaranteed free speech and assembly but political party endorsements and activity not be so protected[?]

Id. at 36-38, 40-41.

political association is speech in and of itself. It allows a person to convey a message about some of his or her basic beliefs through such associations. *See, e.g., Boy Scouts of Am.*, 530 U.S. at 655-56, 120 S.Ct. 2446. Even if we were to believe that the partisan-activities clause regulates political parties and not interest groups because political parties somehow pose a greater "threat" by having a louder and more comprehensive voice, such a distinction would still turn, at least in part, on the content of the message each seeks to convey. Under such a rationale, it is the subject matter of the messages that is at stake—with political parties usually, but not always, emitting a variety of propositions and interest groups often advancing a more narrowly focused agenda. Such line-drawing based on the subject matter of expression is what the Court in *Erznoznik* considered suspect. *Erznoznik*, particularly, discredits any argument that the Minnesota Supreme Court is justified in dealing with one part of the perceived subject matter problem, and not all of it.

In *Kelly*, the majority relied upon *Lee Optical* for the proposition that a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 348 U.S. at 489, 75 S.Ct. 461. But *Lee Optical* turned on a determination that the "Equal Protection Clause goes no further than [prohibiting] invidious discrimination." *Id.* Thus, *Lee Optical*'s underinclusiveness dealt with a matter of degree in a regulation that did not invoke strict scrutiny because the regulation did not implicate a fundamental right or a suspect classification. But underinclusiveness in this free speech case questions the very premise that Minnesota is seeking to address a compelling interest. Quite apart from addressing itself to any "phase" of a particular problem, Minnesota seeks to regulate different sources of the same so-called "problem" based exclusively on whether or not groups are registered as Minnesota political parties. In

Burson, the Court held that Tennessee's failure to restrict charitable and commercial solicitation or exit polling, in addition to campaigning, within 100 feet of polling places did not render the statute "fatally underinclusive" because the evidence in the case did not show that such charitable and commercial solicitation influenced the state's interest of preventing fraud at polling places. 504 U.S. at 207, 112 S.Ct. 1846. In stating that "[s]tates adopt laws to address the problems that confront them" and "[t]he First Amendment does not require States to regulate for problems that do not exist," the Court concluded that there was "simply no evidence that political candidates have used other forms of solicitation or exit polling to commit . . . electoral abuses." *Id.* By contrast, as discussed above, the evidence in this case, and common sense, show that association with political interest groups poses the same threat, if any real threat actually exists at all, to judicial openmindedness as that posed by political parties. This, coupled with the Court's view in *White* that "[a] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited," compels us to find that the underinclusiveness of the partisan-activities clause is not indicative of a legitimate policy choice on the part of Minnesota. *White*, 536 U.S. at 780, 122 S.Ct. 2528 (quotation omitted).[11]

---

[11] We also do not "doom," by setting the bar too high, all future attempts by Minnesota to adopt judicial election regulations that will pass strict scrutiny. *Post* at 79 [85a]. The dissent says that we should apply strict scrutiny with deference to states that choose to address only some threats, and that if we do not, we "occupy the enviable position of not being required to say in advance what line would be permissible," but can simply veto every attempt made at regulation. We respectfully believe this incorrectly characterizes our position and suggests a course of action that no Article III court ought to entertain.

5. The Solicitation Clause

We now turn to an analysis of portions of the solicitation clause. The solicitation clause bars judicial candidates from personally soliciting individuals or even large gatherings for campaign contributions. "In effect, candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements." *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002). And as the majority conceded in *Kelly*, such restriction depends wholly upon the subject matter of the speech for its invocation. 247 F.3d at 863. Judicial candidates are not barred from personally requesting funds for any purpose other than when it is "related to a political campaign." *Burson*, 504 U.S. at 197, 112 S.Ct. 1846. Restricting speech

---

First, we approach this case with the posture the Supreme Court has long prescribed for this inquiry: "it is the rare case in which . . . a law survives strict scrutiny." *Burson*, 504 U.S. at 211, 112 S.Ct. 1846. A law subject to strict scrutiny because it regulates speech based on its content is *presumptively* invalid. *Ashcroft v. ACLU*, 542 U.S. 656, 124 S.Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004). And we do not carte-blanche veto Minnesota's regulations. The court's opinion today meticulously analyzes, in light of *White*, the relevant portions of the partisan-activities and solicitation clauses, as strict scrutiny demands.

Second, we deal, as we should, only with the regulations presented to us today to determine whether the lines drawn by them pass the rigors of strict scrutiny. In making this determination, we cannot overlook the fact that Minnesota unevenly regulates various political groups that have the potential for the same electoral impact that the state cites as justification for its regulations. In carefully applying Supreme Court precedent, we are not in any way exercising a "veto." We simply apply strict scrutiny as required.

Finally, we would flirt with rendering an advisory opinion, or stepping into the legislative arena ourselves, were we to tell Minnesota how to structure its election laws. If the state is unable to strike a balance with its regulations that satisfies strict scrutiny, that does not indicate a failing of the inquiry; rather, it quite likely indicates that the state has impermissibly trod where it may not.

based on its subject matter triggers the same strict scrutiny as does restricting core political speech. "'The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire [subject].'" *Carey*, 447 U.S. at 462, n. 6, 100 S.Ct. 2286 (quoting *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L. Ed. 2d 319 (1980)).

Moreover, the very nature of the speech that the solicitation clause affects invokes strict scrutiny. This is because the clause applies to requests for funds to be used in promoting a political message. It bears repeating that "'[i]t can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15, 96 S.Ct. 612 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L. Ed. 2d 35 (1971)). And promoting a political message requires the expenditure of funds.

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19, 96 S.Ct. 612. As Justice O'Connor stated in her *White* concurrence, "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising." 536 U.S. at 789-90, 122 S.Ct. 2528 (O'Connor, J., concurring). Insofar as the solicitation clause restricts the amount of funds a judicial candidate is able to expend on his or her political message, the regulation is of the same caliber as that struck down in *Buckley*.

Since strict scrutiny is clearly invoked, the solicitation clause must also be narrowly tailored to serve a compelling state interest. Minnesota asserts that keeping judicial candidates from personally soliciting campaign funds serves its interest in an impartial judiciary by preventing any undue influence flowing from financial support. We must determine whether the regulation actually advances an interest in non-biased or openminded judges.[15] Appellants challenge only the fact that they cannot solicit contributions from large groups and cannot, through their campaign committees, transmit solicitation messages above their personal signatures. They do not challenge the campaign committee system that Canon 5 provides under which candidates may establish committees that may solicit campaign funds on behalf of the candidate. "Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5, subd. B(2).

---

[15] The dissent cites polls from other states that show concern on the part of those surveyed that lawyers' and plaintiffs' campaign contributions to judicial candidates influence the decisions of judges. *Post* at 774-75 [62a-63a]. The dissent asserts that political parties embody similar threats of "outside influence" on the judiciary. But these poll numbers provide clear evidence that the perception of influence is of a far different kind, one that is not regulated by Canon 5.

While Canon 5 severs judicial candidates from like-minded voters during an election, it expressly allows lawyers, law firms and other interest groups to donate money to their campaigns. In the 2004 Minnesota Supreme Court election, approximately thirty-two percent of all campaign contributions came from law firm political funds and lawyers. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2004). And in the only contested race, over ninety-seven percent of such contributions went to the incumbent. *Id.* We need not speculate about the impact these lawyer contributions have on the appearance of the judiciary's integrity—the poll numbers noted by the dissent leave little question.

a. Unbiased Judges and the Narrow Tailoring of the Solicitation Clause

We first consider whether the solicitation clause serves an interest in impartiality articulated as a lack of bias for or against a party to a case. Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case. It seems unlikely, however, that a judicial candidate, if elected, would be a "judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case]," *Tumey*, 273 U.S. at 523, based on whether that litigant had contributed to the judge's campaign. That is because Canon 5 provides specifically that all contributions are to be made to the candidate's *committee*, and the committee "shall not" disclose to the candidate those who either contributed or rebuffed a solicitation. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5, subd. B(2). Thus, just as was true with the announce clause and its fit with an interest in unbiased judges, the contested portions of the solicitation clause are barely tailored at all to serve that end. An actual or mechanical reproduction of a candidate's signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request.[16] In the same vein, a candidate would be even less able to trace the source of funds contributed in response to a request transmitted to large assemblies of voters. So, the solicitation clause's proscriptions against a candidate personally signing a solicitation letter or making a blanket solicitation to a large group, does not advance any interest in impartiality articulated as a lack of bias for or against a party to a case.

---

[16] While it is argued that the addition of a candidate's personal signature increases the chances that a candidate will discover the source of contributions because some contributors will send dona-

b. Openminded Judges and the Narrow Tailoring of the Solicitation Clause

We next consider whether the solicitation clause as applied by Minnesota serves an interest in impartiality articulated as "openmindedness." Put another way, would allowing a judicial candidate to personally sign outgoing solicitation letters, or to ask a large audience to support

---

tions directly to the candidate, such a contention is pure conjecture. Though the candidate's personal signature may appear at the foot of the letter, certainly the address included in the letter to which donations are to be sent will be that of the candidate's campaign committee, if Canon 5 is followed. It would take special effort on the part of a contributor to find the personal or business address of a candidate in order to send a direct contribution. But that would be possible even if the candidate did not personally sign the letter. Presumably, any contribution letter will, and should, include the name of the candidate for whom a donation is sought. With that information, the same effort could be expended by a contributor bent on sending a donation directly to the candidate. Adding a candidate's personal or facsimile signature does not alter the potential that a devoted contributor with a little time on his hands might short-circuit Canon 5's interposition of the campaign committee. At any rate, any number of other—more likely—scenarios allowing a candidate to stumble onto the names of contributors are possible, particularly since very specific information about campaign contributions are publicly available, notably on the Internet, from the Minnesota Campaign Finance and Public Disclosure Board. A chance meeting with a supporter who has made a contribution or viewed such information could just as easily result in the supporter commenting to the candidate about contributors to the campaign. This is, at least, no more conjecture than assuming that a contributor will send a contribution directly to a candidate as a result of the candidate's signature on the letter.

particular views through their financial contributions, in some way damage that judge's "willing [ness] to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case"? *White*, 536 U.S. at 778, 122 S.Ct. 2528. We think not. Given that Canon 5 prevents a candidate from knowing the identity of contributors or even non-contributors, to believe so would be a "challenge to the credulous." *Id.* at 780, 122 S.Ct. 2528. Thus, Minnesota's solicitation clause seems barely tailored to in any way affect the openmindedness of a judge. Accordingly, the solicitation clause, as applied by Minnesota, cannot pass strict scrutiny when applied to a state interest in impartiality articulated as openmindedness.

III. CONCLUSION

In *White*, the Supreme Court invalidated the announce clause and remanded the case to this court. Upon further consideration of the partisan-activities and solicitation clauses in light of *White*, we hold that they likewise do not survive strict scrutiny and thus violate the First Amendment. We therefore reverse the district court, and remand with instructions to enter summary judgment for Appellants.

LOKEN, Chief Judge, concurring in part and dissenting in part.

I concur in Parts I, II.B, II.C, II.D.1, and II.D.2 of the opinion of the court. I concur in Part IV of Judge John R. Gibson's dissent and therefore dissent from the holding that Appellants are entitled to summary judgment invalidating the solicitation clauses. I otherwise concur in the judgment of the court.

COLLOTON, Circuit Judge, with whom GRUENDER and BENTON, Circuit Judges, join, concurring in part and concurring in the judgment.

I concur in Parts I, II.B, II.C introduction, II.C.2, II.D introductory text, II.D.1, II.D.2.a, II.D.2.c, II.D.3, and III of the opinion of the court, and in the judgment of the court.

JOHN R. GIBSON, Circuit Judge, with whom McMILLIAN and MURPHY, Circuit Judges, join, dissenting.

The Court today strikes down the partisan activities clauses and the solicitation restriction as a matter of law, by summary judgment, ruling that the interests at stake are not compelling and that the clauses of Canon 5 are either too broad, or not broad enough, to justify their own existence. Preserving the integrity of a state's courts and those courts' reputation for integrity is an interest that lies at the very heart of a state's ability to provide an effective government for its people. The word "compelling" is hardly vivid enough to convey its importance. The questions of whether that interest is threatened by partisan judicial election campaigns and personal solicitation of campaign contributions, and whether the measures Minnesota has adopted were crafted to address only the most virulent threats to that interest, are in part factual questions, which we should not decide on summary judgment. Finally, the Court today adopts an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat. For these reasons, I respectfully dissent.

I.

The partisan activities clauses and the solicitation restriction each serve an interest that is and has been recognized as compelling-protecting the judicial process from extraneous coercion.

A.

In the district court, the Minnesota Boards argued that the state's compelling interest was in protecting judicial independence and impartiality, concepts that were not further defined, perhaps because the Boards considered their meaning apparent. When the announce clause was before the Supreme Court, the opinion authored by Justice Scalia determined that further definition and analysis were essential in order to determine whether impartiality was a compelling state interest and whether the announce clause was narrowly tailored to serve that interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 775, 122 S.Ct. 2528, 153 L. Ed. 2d 694 (2002). Justice Scalia divined three possible meanings for judicial "impartiality." The last meaning was "open-mindedness." *Id.* at 778, 122 S.Ct. 2528.

> This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.

Id. (emphasis in original). Because the announce clause was "woefully underinclusive" to serve any interest in judicial open-mindedness, Justice Scalia concluded that Minnesota had not adopted the announce clause in order to further such an interest; he therefore found it unnecessary to consider whether preserving "judicial open-mindedness" was a compelling state interest. *Id.* at 778-80, 122 S.Ct. 2528. Since *White*, the New York Court of Appeals has held that judicial open-mindedness is a compelling interest because "it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard." *In re Watson*, 100 N.Y.2d 290, 763 N.Y.S.2d 219, 794 N.E.2d 1, 7 (2003).

After *White*, by order of December 9, 2003, the Minnesota Supreme Court created an Advisory Committee to review its Canons 3 and 5 in light of *White*. *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, Slip op. at 1

(Minn. Sept. 14, 2004) (recounting history). The Committee received public comment and held a hearing. Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards, Acknowledgements (April 15, 2004). Following the Committee's report, the Minnesota Supreme Court held its own hearing and received public comment. *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, Slip op. at 1 (Minn. Sept. 14, 2004). In September 2004, the Minnesota Supreme Court amended Canon 5 to add a definition of impartiality that explicitly includes open-mindedness:

> "Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

Canon 5E (as amended Sept. 14, 2004).

The Court today discusses open-mindedness as if the concern were to protect judicial candidates from experiences that would affect their subjective frame of mind. Thus, the Court holds that the state's interest cannot be served by measures that only limit the candidate's conduct during a campaign, not before: "The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity." Op. at 757-58 [31a].

This answers the easy question but ignores the hard one. The threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election. This is a fundamental distinction between the partisan activities and solicitation clauses, on the one hand, and the announce clause, which was at issue in *White*. A central tenet of Justice Scalia's opinion in *White* was that the announce clause regulated a candidate's relation to issues, not people. *See* 536 U.S. at 776, 122 S.Ct. 2528 (The announce clause "does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.").[17] The partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate's relations with people, and organizations of people, not the candidate's relations with issues.

Our Court's concern with temporal underinclusiveness, Op. at 757-58 [31a], is largely a result of its failure to address the threat to open-mindedness from external pressure. The threat to open-mindedness results from allowing the candidates to incur obligations during a campaign that can affect their performance in office. Once a person becomes a candidate, the significance of his relations with the party changes radically, as the party becomes empowered to play the role of judge-maker. Any regulation that governed relations with the party before a person had become a candidate would be overly broad, but a regulation that focuses on the campaign period is tailored to address the threat in the time-frame in which the threat is most overt.

---

[17] One of the chief differences between the opinion of the Court in *White* and the dissents was that the dissents considered the announce clause to affect the candidate's relationship with supporters in a significant way, whereas Justice Scalia did not. *Compare* 536 U.S. at 782, 122 S.Ct. 2528 (Scalia, J.) (judge who changes position stated in campaign no more vulnerable than any other judge who rules in a way disliked by the public) *with id.* at 800, 122 S.Ct. 2528 (Stevens, J., dissenting) (candidate who announces views is telling electorate, "Vote for me because I believe X and I will judge cases accordingly.") *and id.* at 816, 122 S.Ct. 2528 (Ginsburg, J., dissenting) (judge who fails to honor campaign promises may be thought to have betrayed supporters).

Similarly, the Court today dismisses the danger of bias from partisan involvement in judicial campaigns even in cases in which the political parties are litigants, on the ground that the only relevant link between the judge and the party is that both have espoused similar positions on "particular *issues* embraced by the political party." Op. at 755 [25a]. To the contrary, once the partisan activities clauses are gone, having espoused similar positions on issues will be the least significant aspect of the party's relationship to its successful candidate; the truly significant point is that the candidate may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on that litigant for any hope of success in future elections. Once the partisan activities clauses are gone, one may expect that party involvement will become the norm, so that recusal would be pointless, since all judges would be similarly compromised.

B.

"Open-mindedness," in Justice Scalia's terminology, is in reality simply a facet of the anti-corruption interest that was recognized in *Buckley v. Valeo,* 424 U.S. 1, 26-27, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976), and subsequent campaign finance cases. *See FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L. Ed. 2d 455 (1985) (referring to "preventing corruption or the appearance of corruption" as "legitimate and compelling government interests"); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208, 103 S.Ct. 552, 74 L. Ed. 2d 364 (1982) (importance of avoiding corruption has never been doubted and is linked to "the integrity of our electoral process" and the responsibility of the citizen for the successful functioning of that process). Allowing those responsible for the various branches of government to contract obligations inconsistent with the discharge of their public duties threatens the republic created by the Constitution; a republic designed so that it could not protect itself from such a threat would contain the seeds of its own destruction. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390, 120 S.Ct. 897, 145 L. Ed. 2d 886 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

Corruption is a sufficiently serious threat to our institutions that the government may (1) seek to prevent it before it happens and (2) act against it in intermediate forms that are more subtle than bribery and explicit agreements. *See McConnell v. FEC*, 540 U.S. 93, 144, 150-54, 124 S.Ct. 619, 157 L. Ed. 2d 491 (2003) (corruption and appearance of corruption extend beyond bribery to other arrangements which create "sense of obligation" in or "undue influence" over officeholders); *Shrink Missouri Gov't PAC*, 528 U.S. at 389, 120 S.Ct. 897 ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money to 'influence governmental action' in ways less 'blatant and specific' than bribery."); *Nat'l Right to Work Comm.*, 459 U.S. at 210, 103 S.Ct. 552 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

Admittedly, the concern with corruption in the campaign finance cases focuses on payment of money. While the solicitation clause also deals with money-raising, the partisan activities clauses do not, which distinguishes them from the campaign finance cases. Nevertheless, the Supreme Court's decision in *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L. Ed. 2d 796 (1973), demonstrates that the concern with corruption and undue influence is not limited to obligations resulting from payments of money. *Letter Carriers* recognized the danger partisan allegiances posed to neutral administration of justice. That case upheld restraints imposed by the Hatch Act on executive branch employees' political activities, in part because of the effect partisanship could have on the performance of their duties:

> It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

413 U.S. at 564-65, 93 S.Ct. 2880. *Accord In re Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1290-91 (2003) (per curiam). *Letter Carriers* shows that what kind of obligations may be considered inconsistent with government office depends on the nature of the office in question. Where the office requires "impartial execution of the laws," partisan entanglements can be inconsistent with the demands of the office. *Letter Carriers* and the campaign finance cases are not separate lines of authority, but are closely connected, since the Supreme Court relied heavily on *Letter Carriers* in identifying and defining the anti-

corruption interest in *Buckley v. Valeo*, 424 U.S. at 27, 96 S.Ct. 612.

The Republican Party of Minnesota argues that the holding of *Letter Carriers* is irrelevant here because "the role of judges is closer to the role of legislators than [the] executive branch bureaucrats" affected by *Letter Carriers*. Supplemental brief of Oct. 22, 2002 at 6 n. 6. The Supreme Court in *White* specifically avoided equating the judicial office with the legislative: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783, 122 S.Ct. 2528.

The need for "neutrality" identified in Letter Carriers is even more important for the judicial branch than the executive. A long line of cases stresses the right of litigants to a neutral adjudicator. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980), Justice Marshall wrote:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

(citations omitted).

The circumstances that can result in violation of the due process right to a neutral judge are not limited to situations in which a judge has a pecuniary interest at stake in the litigation. In *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972), due process was violated when the defendant was convicted by the mayor of a village that depended on fines collected in the mayor's court. The mayor himself did not share in the revenues, but the Supreme Court held:

> [T]he test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused ...." [quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).] Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial," [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Id. at 60, 93 S.Ct. 80. Other cases in which a judge's neutrality was intolerably compromised by non-pecuniary considerations include *Johnson v. Mississippi*, 403 U.S. 212, 215-16, 91 S.Ct. 1778, 29 L. Ed. 2d 423 (1971) (judge who had previously lost a civil rights suit to defendant could not try defendant for contempt); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (judge who acts as "one-man judge-grand jury" cannot then try indicted defendant); and *Offutt v. United States*, 348 U.S. 11, 17, 75

S.Ct. 11, 99 L.Ed. 11 (1954) (judge who had become "personally embroiled" with lawyer could not try the lawyer for contempt). There is no easily applied formula for deciding when a judge has an impermissible interest in litigation; "Circumstances and relationships must be considered." *Murchison*, 349 U.S. at 136, 75 S.Ct. 623. But even at a point where the judge cannot be said to be actually biased, "[O]ur system of law has always endeavored to prevent *even the probability* of unfairness." *Id.* (emphasis added).

We do not have to conclude that adjudication by judges who were selected without the protections of the partisan activities clauses violates the due process rights of the litigants. Indeed, we could not well do so, since, as the Supreme Court remarked in *White*, partisan judicial elections were common in the mid-nineteenth century, when the Fourteenth Amendment was adopted. *See White*, 536 U.S. at 785, 122 S.Ct. 2528 ("[J]udicial elections were generally partisan during this period [nineteenth and early twentieth centuries], the movement toward nonpartisan judicial elections not even beginning until the 1870's."). Currently, some fifteen states maintain partisan judicial elections for at least some of their judges, American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2004); *see Suessmann v. Lamone*, 383 Md. 697, 862 A.2d 1, 19 (2004) (Maryland circuit court primaries are held to be partisan), and no one contends that the states may not choose this method of selection.

Nevertheless, the participation of judges who have been allowed or forced to make themselves dependent on party largesse for their continued tenure affects the state's ability to provide neutral judges and the public's perception of such neutrality. The state has a compelling interest in keeping its judges free from the odor of self-interest or partisanship. In *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L. Ed. 2d 487 (1965), Cox was convicted of picketing near a courthouse "with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty" after he demonstrated in protest against the arrest of students who would be tried by judges present at the courthouse during the demonstration. *Id.* at 560, 564-65, 85 S.Ct. 476. The law did not prohibit all picketing, but picketing done with the intent to influence the administration of justice. *Cf. Carey v. Brown*, 447 U.S. 455, 460-63, 100 S.Ct. 2286, 65 L. Ed. 2d 263 (1980) (prohibiting picketing for one purpose while allowing it for another is content discrimination). The Supreme Court stated that it was unlikely that the picketing would actually affect the judges' decisions in the students' cases. *Cox*, 379 U.S. at 565, 85 S.Ct. 476. The Court did not suggest that if the state had allowed the picketing, it would have caused a due process violation for any particular litigant. However, the Court said, "A state may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Id.* Thus, the state's interest in preserving the appearance of neutrality justified the restriction on expressive conduct. *Accord In re Chmura*, 461 Mich. 517, 608 N.W.2d 31, 40 (2000) ("state's interest . . . extends to preserving public confidence in the judiciary"). *Cf. Letter Carriers*, 413 U.S. at 565, 93 S.Ct. 2880 ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

The New York Court of Appeals recently confirmed that a state has a compelling interest in presenting the appearance as well as the fact of due process:

> [L]itigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has

> the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism.

In re Raab, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1290-91 (2003) (per curiam).

In its September 2004 deliberations about whether to amend the partisan activities clauses of Canon 5, the Minnesota Supreme Court articulated just those concerns outlined above. The court stated:

> [T]he goal of an impartial judiciary is compelled by the due process rights of litigants. Due process requires decisionmakers who are fair, unbiased, and impartial, and importantly, decisionmakers who are perceived as such by the litigants who appear before them. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L. Ed. 2d 823 (1986); *In re Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1290-91 (2003) (per curiam). Moreover, we cannot underestimate the importance of the public's perception that judges are fair, unbiased, and impartial to the continued respect for and legitimacy of the judicial branch. *See Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L. Ed. 2d 714 (1989). Without this perception, the public's confidence and support cannot be maintained and the very independence of the judicial branch mandated by the Constitution will be threatened.

In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004). These concerns fit within the concept of judicial open-mindedness, and they are a compelling state interest.

C.

Although in *White* Justice Scalia observed that the parties and this Court appeared to make no distinction between the concepts of judicial "independence" and "impar[illegible]ity," 536 U.S. at 775, 122 S.Ct. 2528 n.6, in its Sep[illegible]ber 14, 2004 order, the Minnesota Supreme Court explained its decision not to amend the partisan activities clauses partly by relying on the need for separation of powers:

> [T]he separation of powers inherent in the creation of three distinct branches of government, one of which is the judicial branch, in article III, section 1 of the Minnesota Constitution provides the constitutional underpinning for the independence of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.

In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004). The separation of powers interest is a concern for institutional independence that is distinct from concern for impartiality in any of the senses identified by Justice Scalia.

Separation of powers is a concept basic to the states' constitutions as well as the federal Constitution. A state's choice of how to organize its government is "a decision of the most fundamental sort for a sovereign entity." *See Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L. Ed. 2d 410 (1991) (authority of the people of the states to determine qualifications of important state officials is such a decision). Even the narrowest notion of federalism requires us to recognize a state's interest in preserving the separation of powers within its own government as a compelling interest.

D.

The extent and severity of the threat to the state's interests are factual questions that must be proven empirically. *See Shrink Mo. Gov't PAC*, 528 U.S. at 390-94, 120

S.Ct. 897. In the proceedings in the district court, the Boards adduced sufficient evidence of that threat so that summary judgment for the plaintiffs would not have been appropriate. But recent events make it far less appropriate that our Court should enter judgment as a matter of law on questions of fact as to which there is no record before us.

The record below contained the affidavit of a former governor of Minnesota who stated that he had a lifetime of experience in understanding how Minnesota citizens "think and feel" and that partisan judicial campaigns would lessen Minnesotans' confidence "in the independence of the judiciary." A former Chief Justice of the Minnesota Supreme Court stated that partisan judicial campaigns would "put pressure on judges to decide cases in ways that would impress the judge's supporters favorably."

But far more important to our holding today is the fact that the Minnesota Supreme Court has recently reconsidered the provisions of Canon 5 at issue here, held hearings, and received public comment. It is a matter of interest that the parties in this case, in briefing and argument, made no mention of this development. As the canon was reconsidered, amended in part and reiterated in part while this case was pending on rehearing, failure to consider the effect of these developments may well cause this Court's opinion to be moot from its inception.

This suit seeks a permanent injunction; the relief the Court orders today does not merely look to the past, when the district court record was made, but operates in the present and into the future. *See* Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Tex. L. Rev. 269, 276-77 (1999) (where relief is prospective, appellate court should respond to changes in facts that affect validity of legal ruling). The Supreme Court in a number of cases has made clear that we must consider on appeal any change, either in fact or in law, which has supervened since the judgment was entered. The Court in *Ashcraft v. Tennessee*, 322 U.S. 143, 156, 64 S.Ct. 921, 88 L.Ed. 1192 (1944), stated: "In disposing of cases before us it is our responsibility to make such disposition as justice may require. 'And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.' *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 79 L.Ed. 1082 [1935]; *State Tax Commission v. Van Cott*, 306 U.S. 511, 515-16, 59 S.Ct. 605, 83 L.Ed. 950 [1939]."

The Advisory Committee appointed by the Minnesota Supreme Court to study the issue concluded that there was a threat to the state's interest that required regulation of partisanship in judicial campaigns: "In considering the need for restrictions on the political activity of judicial election candidates, the Advisory Committee is also cognizant of the experience of actual or perceived corruption of the judiciary in states that permit partisan judicial elections." Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards, Comments–Canon 5, No. C4-85-697 (Minn. April 15, 2004). While we do not have access to the evidence before the Committee, widely available and publicized evidence substantiates the fear that the majority of the public believes that partisanship does influence the decisions of state courts. For instance, a poll conducted in 1999 showed that 81% of the respondents agreed that "politics influences court decisions." National Center for State Courts, How the Public Views the State Courts 41 (1999). The Advisory Committee recommended deleting the party identification and the attend and speak clauses on narrow tailoring grounds. Advisory Committee Report at Comments—Canon 5. After receiving the Committee report and conducting a hearing and receiving public comment, the Minnesota Supreme Court decided to retain all three partisan activities clauses. *In re Amendment of the Code of Judicial Conduct*, No. c4-85-697 (Minn. Sept. 14, 2004).

The Advisory Committee unanimously recommended against changing the ban on the judicial candidate's personal solicitation of campaign contributions. Advisory Committee Report at Canon 5B(2)—Personal Solicitation of Campaign Contributions. Again, widely available poll numbers support the Committee's conclusion that solicitation of campaign contributions carries with it a significant threat to the state's interest in freedom from external coercion of judges. For example, "a recent Wisconsin poll found that more than three-quarters of those surveyed believe that campaign contributions from lawyers and plaintiffs in high-profile cases influence the decisions of these judges in court," and a study in Texas "found that 83 percent of the public and 79 percent of lawyers believe that campaign contributions have a significant influence on a judge's decision." Alexander Wohl, *Justice for Rent*, The American Prospect (May 22, 2000). A summary of poll results compiled by the National Center for State Courts reported on fifteen recent polls, showing not only that the public believes campaign contributions affect judicial decisions, but also that lawyers and even judges agree. For instance, a poll from Texas showed that 48% of state appellate and trial judges surveyed believed that campaign contributions had a fairly significant or very significant degree of influence over judicial decisionmaking. National Center for State Courts, Summary of Responses to Public Opinion Survey Questions Concerning Judicial Campaign Fundraising (July 28, 2004). A Pennsylvania survey of registered voters showed that 95% of those surveyed believed that judges' decisions were influenced by large contributions to their election campaigns at least some of the time. *Id.* This is the kind of evidence that would substantiate the threat to judicial open-mindedness (and the appearance of it) from partisan obligations and from judicial campaign fund-raising.

The Court today errs grievously in issuing a ruling that strikes the provisions based on the 1997 factual record without considering the September 2004 record before the Minnesota Supreme Court. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 124 S.Ct. 2783, 2794, 159 L. Ed. 2d 690 (2004) (taking into account technological changes in internet filtering since time of district court's findings). Since the holding is based on a factual record that antedates the most recent version of Canon 5, one must question whether the Court's holding today even applies to the current version of Canon 5, based as it is, on a 2004 factual determination which the Court does not take into account.

E.

The Court today holds that Minnesota's interest in judicial open-mindedness is not a compelling interest because the solicitation and partisan activities clauses are "underinclusive," meaning that they do not address all "significant threats" to the state's asserted interest. Slip op. at 32 [33a-34a]. The Court today says that underinclusiveness of a regulation will establish that the state's purported interest is not compelling:

> A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being 'compelling.'

Op. at 750 [16a]. This is only partly correct, and the part that is correct is not relevant to our case.

Where the governmental actor asserts an interest that has not been previously recognized as compelling and either the importance of the interest or the urgency of the threat to the interest is debatable, adoption of a regulation that is only partly effective may show that the governmental actor can, indeed, live with the problem. Where the state's asserted interest is previously unrecognized as compelling and is not self-evidently vital to the state's ability to function as intended in the Constitution, then the state's own lack of zeal or care in protecting the interest does argue that the asserted interest should not be considered paramount to individuals' First Amendment rights.

However valid that reasoning may be in cases where the asserted interest is novel or questionable, it is not valid here because the interests at stake in this case have already been recognized as compelling. Compelling interests cannot be negated simply because a particular measure adopted in their name is deemed ineffective. The Court today acknowledges that avoiding judicial bias that denies litigants due process is a compelling interest, whether or not a particular measure furthers it effectively.[18] Likewise, protecting the integrity of the states' courts has long been recognized as compelling, and by the same reasoning, that interest cannot be negated simply because a particular measure may not protect it fully. As Justice Kennedy wrote in his concurrence in *White*:

> Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. Nothing in the Court's opinion should be read to cast doubt on the vital importance of this state interest. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments

---

[18] "It can hardly be argued that seeking to uphold a constitutional protection, such as due process, is not per se a compelling state interest." Slip op. at 22 [22a].

> depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

536 U.S. at 793, 122 S.Ct. 2528. It is a misreading of the Supreme Court's underinclusiveness discussions, and, most significantly, a non sequitur as well, to say that the interest in judicial integrity could be reduced to insignificance because Canon 5 does not go far enough to protect it.

F.

Preserving judicial open-mindedness, and the appearance of it, should be recognized as the same compelling state interest in avoiding corruption interest that was identified in *Buckley v. Valeo* and the campaign finance cases. Though it is the same anti-corruption interest, the need to protect that interest is more urgent and vital in the context of the judiciary because in that context outside influences threaten litigants' due process interest in adjudication in accord with the law and the facts of their case. A further state interest in preserving the separation of powers between state branches of government should also be recognized as compelling. The Minnesota Supreme Court has recently re-examined Canon 5 and clarified that the Canon is meant to protect those state interests. Judicial integrity and separation of powers are interests of the highest importance in guaranteeing the proper functioning of state government and we have no warrant to deny their importance.

II.

A.

Though the Court today errs in holding that underinclusiveness of a regulation can negate the importance of the state's interest in the integrity of its judiciary, underinclusiveness does indeed point to a different problem—it raises an inference of pretext. Even where an asserted governmental interest is undeniably compelling, a failure to fully address threats to that compelling interest can be evidence of pretext. The governmental actor may have missed the target because it was not aiming at it, but was actually seeking to accomplish some other, impermissible goal, such as viewpoint discrimination. In such a case, underinclusiveness of a regulation does not cast doubt on whether the asserted interest is compelling, but whether it is genuine. *See Johnson v. California*, — U.S. —, —, 125 S.Ct. 1141, 1156, 160 L. Ed. 2d 949 (2005) (Stevens, J., dissenting) (failure to take measures that would be more effective at addressing prison violence than challenged regulation "undercuts the sincerity" of the state's concern about violence). This is the same point Justice Scalia made in *White* when he quoted his earlier words, "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited," *Republican Party of Minnesota v. White*, 536 U.S. 765, 780, 122 S.Ct. 2528, 153 L. Ed. 2d 694 (2002) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring in judgment)), and spoke of a "challenge to the credulous." *White*, 536 U.S. at 780, 122 S.Ct. 2528.

The Supreme Court has twice upheld speech restrictions on strict scrutiny review where the measure was tailored to address only the most critical threat to the governmental interest, even where some threat to the asserted interest remained unaddressed. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L. Ed. 2d 652 (1990), and *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L. Ed. 2d 491 (2003). In *Austin*, Michigan restricted the political expenditures of corporations in support of or opposition to candidates for state office. The compelling interest for such regulation was the concern that entities that amassed wealth in the economic marketplace would parlay that wealth into "unfair advantage in the political marketplace," *id.* at 659, 110 S.Ct. 1391, because their ability to spend corporate money bore no relation to political support for the ideas the corporations spent their money to promote, *id.* at 659-60, 110 S.Ct. 1391 (opinion of Court) and 670, 672 (Brennan, J., concurring). The Chamber of Commerce attacked the Michigan law as underinclusive because it did not regulate expenditures by unincorporated labor unions, which also amassed political war chests. *Id.* at 665, 110 S.Ct. 1391.

Austin rejected the underinclusiveness challenge, reasoning that the corporations enjoyed greater government-conferred legal advantages enhancing their ability to accumulate wealth. 494 U.S. at 665, 110 S.Ct. 1391. These legal advantages of corporate form made a crucial distinction between corporations and unions. *Id.* at 666, 110 S.Ct. 1391 ("Michigan's decision to exclude unincorporated labor unions from the scope of § 54(1) is therefore justified by the crucial differences between unions and corporations."). Additionally, case law permitted union members to opt out of contributing to the union's political activities, which meant that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* The Michigan law therefore passed strict scrutiny.

The Supreme Court also upheld a statute on strict scrutiny review despite an underinclusiveness attack in its recent campaign finance case, *McConnell v. FEC.* In *McConnell*, the Court considered a challenge to section 203 of the Bipartisan Campaign Reform Act of 2002, which in turn amended section 316(b)(2) of the Federal Election Campaign Act of 1971, to prohibit use of corporations' and unions' treasury funds to pay for certain kinds of election advertising. 540 U.S. at 204 & n. 87, 124 S.Ct. 619. Because the provision restricted expenditures rather than contributions, it had to be tested by strict scrutiny. *Id.* at 205, 124

S.Ct. 619 (asking whether "compelling governmental interest justifies" measure); *id.* at 330, 124 S.Ct. 619 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies [to section 203]."). The plaintiffs contended that the section was underinclusive because it did not apply to election advertising in the print media or on the Internet. *Id.* at 207, 124 S.Ct. 619. The Court held that the evidence in the case supported the conclusion that television advertising posed the greater threat, and therefore, "The record amply justifie[d] Congress' line drawing." *Id.* at 208, 124 S.Ct. 619. The Court said that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 207-08, 124 S.Ct. 619 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976)). *McConnell* confirms that the sort of underinclusiveness that is fatal in strict scrutiny is arbitrary underinclusiveness, not underinclusiveness that results from attempting to focus the restriction on only the severest form of the threat to a compelling governmental interest.

A content-based restriction was also upheld on strict scrutiny review despite an underinclusiveness challenge in *Burson v. Freeman*, 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L. Ed. 2d 5 (1992). Freeman contended that a statute restricting campaign activity within 100 feet of the polls on election day was underinclusive because it did not restrict other types of speech, including commercial solicitation and exit polling. The Court rejected that attack because there was "simply no evidence that political candidates have used other forms of solicitation or exit polling to commit . . . electoral abuses." *Id.* Thus, whether the statute was impermissibly underinclusive depended on the evidence about the extent and severity of the threat to the state's asserted interest.

B.

The question at issue in our consideration of the partisan activities clauses, as in *Austin*, is whether there is a "crucial difference," 494 U.S. at 666, 110 S.Ct. 1391, in the threat posed by some entities that justified regulating them while leaving others unregulated. To rebut the inference of pretext, the government must show that the speech it has burdened poses a different, more serious threat to its asserted interest than the speech it chose not to regulate. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 45 L. Ed. 2d 125 (1975) ("[E]ven a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions."); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Penn. L. Rev. 2417, 2423 (1966) ("[A] law is not narrowly tailored if it fails to restrict a significant amount of speech that harms the government interest *to about the same degree as does the restricted speech.*") (emphasis added); *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003) ("Canon 5(A)(1)(e) is narrowly tailored to meet [state's interest in avoiding bias] because it applies only to conduct which presents the greatest risk to that interest . . . ."), *cert. denied*, 541 U.S. 960, 124 S.Ct. 1722, 158 L. Ed. 2d 401 (2004).

Recently, the Supreme Court has held that the differences between political parties and other interest groups could warrant differential regulation of the two kinds of groups. This distinction between political parties and other interest groups was at issue in *McConnell*, where the Court considered Title I of the Bipartisan Campaign Reform Act, which imposed restrictions on political parties' fund-raising activities that were not imposed on interest groups, such as the National Rifle Association, the American Civil Liberties Union or the Sierra Club. The plaintiffs contended that the distinction violated Equal Protection. The Court held the distinction was permissible, because

> Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group .... Congress' efforts at campaign finance regulation may account for these salient differences.

540 U.S. at 188, 124 S.Ct. 619 (citation omitted).[19]

Before the district court, the Boards contended that special restrictions on judicial candidates' reliance on political parties were necessary to protect Minnesota's tradition of non-partisan judicial elections, which dates from the enactment in 1912 of the statute making Minnesota judicial elections non-partisan. *See* 1912 Minn. Laws, Spec. Sess., ch. 2; *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992) (discussing history of Minnesota's judicial elections).

The Minnesota Supreme Court greatly amplified that explanation when it decided to reject the Advisory Committee's proposed revisions to the partisan activities clauses in September 2004. The supreme court order stated, "We conclude that the restrictions on partisan political activity contained in our Code of Judicial Conduct are too important to undermine based on the possibility that they may be vulnerable to constitutional attack, particularly as we are convinced that there are sound bases for their constitutional validity." *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, slip op. at 2-3 (Minn. Sept.14, 2004). The court then reviewed the history of Minnesota's commitment to non-partisan judicial elections. *Id.* at 639 N.W.2d 55.

---

[19] As Dean Briffault has observed:

> The "special relationship" between parties and officeholders that the Court recognized in *McConnell* can also threaten judicial independence by too closely linking judges to party leaders and the preferences of those leaders, even in cases in which neither the party leaders nor the party itself are participating.

Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. Penn. L. Rev. 181, 232 (2004). This substantiates the threat to the separation of powers interest discussed in section IC, *supra*.

The movement towards non-partisan judicial elections was a reform movement meant to insulate judges from the party machines that had captured the state courts during the late nineteenth and early twentieth centuries. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Studies 431, 448-50 (2004). Between 1910 and 1958, eighteen states adopted non-partisan judicial elections. *Id.* at 436. Among states that elect their judges, the majority use nonpartisan elections; currently, twenty states have nonpartisan elections for at least some of their judgeships, as opposed to fifteen who have at least some partisan elections.[20] American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2004); *see Suessmann v. Lamone*, 383 Md. 697, 862 A.2d 1, 19 (Md. 2004) (Maryland circuit court primaries are held to be partisan). Among the states with non-partisan judicial elections, there is a wide variety of measures to enforce the non-partisan character of the election; some states have few such measures, but many have measures similar to those at issue here.[21] Thus, the idea that non-partisan campaigns might protect the judiciary from improper external pressures is hardly a novel idea, but must be placed within a broad national reform movement that still has significant sway within the states.

---

[20] Some states have both partisan and non-partisan elections for different offices; in this dissent they are counted as both partisan and non-partisan election states. Some states have hybrid systems in which candidates are nominated through party primaries or conventions, but appear without party designation on the general election ballot. These hybrid-system states are here counted as partisan election states, following the classification used by the American Judicature Society. *See* American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2004).

---

[21] Of the twenty states with at least some non-partisan judicial elections, nine have restrictions of some kind on stating party affiliation, and one forbids actual party affiliation. Ark. Code of Jud. Cond., Canon 5A(1)(f) and 5C(1)(a)(iii) (candidate may privately, but not publicly, identify self as affiliated with political party); Fla.Code of Jud. Cond., Canon 7C(3) ("The candidate should refrain from commenting on the candidate's affiliation with any political party . . . ."); Ky. Supreme Court Rule 4.300, Canon 5A(2) ("A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering. If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party."); Minn. Code of Jud. Cond., Canon 5A(1)(a); Miss. Code Ann. § 23-15-973 ("It shall be unlawful for any candidate for any of the offices mentioned in this section to align himself with . . . any political faction or any political party at any time during any primary or general election campaign."); Nev. Code of Jud. Cond., Canon 5C(1)(ii) (candidate may identify party "upon request"); Ore. Code of Jud. Cond., Canon 4-102(C) (judicial candidate shall not knowingly "[p]ublicly identify the judicial candidate for the purpose of election, as a member of a political party other than by registering to vote or as allowed by ORS 249.015."); S.D. Code of Jud. Cond., Canon 5C(1)(a)(ii) (judge may identify self as member of political party "for voting purposes only"); Wash. Code of Jud. Cond., Canon 7(A)(1)(e) (judicial candidates shall not "identify themselves as members of a political party, except as necessary to vote in an election."), *enforced In re Kaiser*, 111 Wash. 2d 275, 759 P.2d 392, 400 (1988); Wis. S.Ct. Rule 60.06(2)(b) (judicial candidates shall not be a member of any political party).

Arkansas and Florida allow speaking at party gatherings only if the candidate's opponent is also invited to speak. Ark. Code of Jud. Cond., Canon 5 C(1); Fla. Code of Jud. Cond., Canon 7C(3).

Three other states directly or indirectly prohibit a candidate from seeking party endorsement. Ark. Code of Jud. Cond., Canon 5A(1)(d); Idaho Code of Jud. Cond., Canon 5A(1)(d); Miss. Code Ann.

The partisan activities clauses at issue here were adopted in 1997 as part of an effort to clarify and formalize Minnesota's tradition of non-partisan elections and to supplement the guidance given by the non-partisan election statute. The mere omission of party names from the ballot apparently does little to make campaigns non-partisan, as shown by the situations in Ohio and Michigan, where ostensibly non-partisan general elections are preceded by vigorous partisan campaigns. *See* American Bar Ass'n Commission on the 21st Century Judiciary, Justice in Jeopardy 17 (2003) ("Even states with ostensibly non-partisan general elections for judges, such as Michigan and Ohio, have experienced highly politicized races when two-party competition is fierce and the party affiliations of the candidates are widely known."); *id.* at 77 ("States with true nonpartisan elections, such as those in Wisconsin, must therefore be distinguished from states such as Michigan, where the political parties nominate candidates to run in ostensibly nonpartisan general elections, which in fact have been very partisan indeed."); Anthony Champagne, *Political Parties and Judicial Elections*, 34 Loy. L.A.L. Rev. 1411, 1415-16 n. 16 (Michigan, Ohio, and Idaho have non-partisan ballots but partisan campaigns). M. DePaul Willette, Executive Secretary of the Board on Judicial Standards, stated to the Minnesota Supreme Court, "The nonpartisan nature of Minnesota's judicial elections have been taken for granted. But a search of the statutes and rules showed there is, in fact, very little, if any, specific language describing what nonpartisan elections are."

---

§ 23-15-973 ("It shall be unlawful for any candidate ... to align himself ... with any political faction or any political party ....").

Comments to the Minnesota Supreme Court, No. C7-81-300 at 2 (Nov. 14, 1997). Willette's commentary on the proposed amendments to Canon 5, which contained the three partisan activities clauses at issue here, shows that the Board was animated by a desire to effectuate more completely the nonpartisan election statute and formalize the tradition of nonpartisan elections that the Board believed was not adequately protected by existing Minnesota law. One of the changes made to Canon 5 in 1997 was to include the statement, "Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd. 6." Canon 5A (1997). The Board on Judicial Standards announced in proposing the amendments that they were meant to protect Minnesota's "long tradition of nonpartisan judicial elections." Comments to the Minnesota Supreme Court, No. C7-81-300 at 4 (Nov. 14, 1997).

The hearing the Minnesota Supreme Court held before the 1997 amendments to Canon 5 included consideration of whether partisan activities restrictions should be limited to political parties as defined in Canon 5 or whether they should apply to other advocacy groups. There was testimony on both sides of that issue. In addition to the testimony of Judge Meyer (which the Court quotes at slip op. 36-37 [37a-38a] n. 13) and others against the definition adopted, DePaul Willette testified:

> Let's assume that the rule is not in place and two candidates in a race; one is endorsed by the republican party, one is endorsed by the democratic party. What do we have? We have a party race. It's not a nonpartisan contest. We have a party contest which will lead us, in my judgment, to the kind of fundraising and the problems that Illinois and Texas are facing today with multi-million dollar budgets for people who want to retain or gain judicial positions.

Hearing before the Minnesota Supreme Court on Amendment to Canon 5 of the Code of Judicial Conduct, at 20-21 (Nov. 17, 1997).

Willette's testimony also refutes the idea that the Minnesota Supreme Court intentionally failed to address the threat from partisan activity by single-issue interest groups. Willette testified that one reason single-issue interest groups were not included in the partisan activities clauses is that single-issue groups would require a commitment that would have been banned under the announce clause at the time. *See id.* at 12-13. Obviously, the announce clause can no longer play any role in the regulatory scheme; however, the Minnesota Supreme Court's expectation that the announce clause would serve to moderate a candidate's relation with interest groups was reasonable at the time and therefore tends to show that the partisan activities clauses were effective at the time adopted. Moreover, the invalidation of the announce clause has apparently had a profound effect on the pressures on judicial candidates in that it is apparently now common for organizations to send judicial candidates questionnaires asking them to state their positions on an array of disputed legal issues. *See, e.g., North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1027 (D.N.D.2005) (example of "voter's guide" questionnaire submitted to judicial candidates in North Dakota, including items asking candidate to agree or disagree with statements such as: "I believe that the North Dakota Constitution does not recognize a right to homosexual sexual relationships" and "I believe that the North Dakota Constitution does not recognize a right to abortion."). In light of the invalidation of the announce clause, I believe a remand for further evidence on the issue of pretext would be more appropriate than for us to order summary judgment on a record with evidence supporting both sides of the question.

Once again, the most pertinent evidence about the thinking behind the current Canon 5 is evidence that has not yet been presented to the district court. The Advisory Committee in 2004 reviewed *McConnell* and other Supreme Court case law and concluded:

> In the Advisory Committee's view, there is ample support for Canon 5's current limitation of the political activity restrictions to political party activities, while leaving unregulated candidate activities relating to special interest or other groups that do not rise to the level of a political party. As noted above, *McConnell* itself clearly supports the validity of this limitation in order to promote the compelling interests in judicial impartiality, independence, and appearance of impartiality and independence.

Advisory Committee Report, Comments—Canon 5. The Committee reasoned that parties differ from other interest groups in the degree of symbiosis that exists between candidate and party and in the unique role that political parties play in the workings of the other branches of government. *Id.* Finally, the Committee concluded that recusal was not an adequate remedy for the problems posed by partisan involvement in judicial elections because recusal requests depend on the parties' ability to know all relevant facts, because recusal involves significant administrative costs, and because it may simply be inadequate to counteract the damage to the reputation of the judiciary from the appearance of institutional partiality. *Id.* The Committee later noted that a minority within the committee had been concerned that the restrictions were underinclusive in failing to address special interest and other political groups, but that "the Committee as a whole acknowledges that it would be difficult to draft a workable rule to limit involvement by special interest or other political groups for a number of reasons." *Id.* at Application of the Code of Judicial Conduct.

McConnell demonstrates that the distinction between political parties and other interest groups could be defended as a valid response to "salient differences" between the kind of threat each sort of organization poses to the state's interests. In addition to its institutional experience with non-partisan judicial elections since 1912, in 1997 the Minnesota Supreme Court had before it some evidence validating the distinction between political parties and other interest groups, and some challenging that distinction. It resolved that conflict, concluding that political parties posed the greater threat. The conclusion was reaffirmed in 2004 by a committee of lawyers and scholars charged with the task of scrutinizing Canon 5 for constitutional problems, and later by the Minnesota Supreme Court. Our Court errs in concluding as a matter of law that the distinction between political parties and other interest groups is pretextual. The evidence as to this distinction is best considered by the district court on remand.

III.

Our Court's underinclusiveness analysis goes astray by failing to recognize a compelling interest and by failing to allow the Boards to rebut the inference of pretext. Sections I & II, *supra*. But the signal failing of the Court's underinclusiveness analysis is that it envisions a kind of strict scrutiny[22] that simply cannot work when applied to real cases because it does not take into account the need for limited deference to the state's attempt to solve the problems that besiege it.

---

[22] Whether strict scrutiny should be applied to the solicitation clause is not entirely free from doubt. In an amicus brief filed in this en banc rehearing, the Conference of Chief Justices argues that the personal solicitation ban regulates contributions to a political candidate and therefore should not be subjected to strict scrutiny, but to the lesser standard appropriate to campaign contribution limitations. Conference of Chief Justices' brief at p. 16. This argument finds support in *McConnell v. FEC*, 540 U.S. 93, 138-41, 124 S.Ct. 619, 157 L. Ed. 2d 491 (2003), which applied the less rigorous scrutiny when reviewing a law restricting national political parties' ability to solicit contributions. *See also* Richard Briffault, *Judicial*

"Deference" is not a word we associate with strict scrutiny review, but there is indeed a place for limited deference, as shown in the recent case of *Grutter v. Bollinger*, 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L. Ed. 2d 304 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). There are three reasons why we should employ some limited deference to the judgment of the state of Minnesota in this case, if after remand, we were satisfied that the judgment was well-supported by cogent evidence and the possibility of pretext had been rebutted.

The Court's primary reason for striking the partisan activities clauses today is that the provisions are underinclusive. The main thrust of the narrow-tailoring requirement is directly to protect speech rights by avoiding an infringement broader than the need to protect the government's interest: "The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished." *Ashcroft v. ACLU*, 542 U.S. 656, 124 S.Ct. 2783, 2791, 159 L. Ed. 2d 690 (2004). Exacting, de novo review by the courts to assure that the government has chosen the least restrictive alternative directly protects

---

Campaign Codes after Republican Party of Minnesota v. White, 153 U. Pa. L. Rev. 181, 225-26 (2004) ("The restriction on personal solicitation by a candidate should be subject to the same less rigorous standard of review as the restriction on contributions."). Because the parties have assumed the same level of scrutiny would apply to the solicitation clause as to the other provisions of Canon 5, neither the panel opinion in *Kelly*, 247 F.3d 854 (8th Cir. 2001), nor that on remand, 361 F.3d 1035, 1048-50 (8th Cir. 2004), entertained the possibility that the contributions standard should apply. Though the argument is worthy of more attention, I will follow the parties and our Court in assuming the proper standard is strict scrutiny.

the individual's speech right. The objection that a measure is underinclusive, on the other hand, cuts in the opposite direction; it being the command of the First Amendment not to abridge the freedom of speech, one is at first surprised to learn that a law can offend the First Amendment because the law does not forbid enough speech. The vice in an underinclusive law is not that the underinclusiveness directly suppresses speech but that it raises a suspicion of pretext—which is just an inference, and which can be rebutted by sufficient evidence. Even in questions subject to strict scrutiny, there simply has to be some room for judgment about how wide to cast the net, and it should be apparent that it is more offensive to the First Amendment for a measure to be too broad than to be too narrow. The problem with applying the same kind of exacting, de novo review to underinclusiveness as we do to overinclusiveness is that the two requirements form a Catch 22 situation, in which a drafter's very effort to avoid overinclusiveness makes the measure vulnerable to attack for underinclusiveness.[21]

In *McConnell*, even when applying strict scrutiny, the Court acknowledged the need for "legislative choice" and "Congress' line drawing." 540 U.S. at 207-08, 124 S.Ct. 619. Thus, when considering the argument that the restrictions on corporations' and unions' expenditures for "electioneering communications" were underinclusive because they did not extend to print or internet advertising, the Court quoted *Buckley* in stating that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* The Court rejected the argument that the restriction on expenditures for electioneering communications was underinclusive because it did not include print or internet ads; in order to respond to the problem at all, Congress had to be able to draw lines somewhere: "One might just as well argue that the electioneering communication definition is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated." *Id.* at 208, 96 S.Ct. 612. The Court considered it obvious that someone had to decide whether the restrictions should take effect 60 days or 61 days in advance of the election; if Congress had to be able to show that the problem was utterly eradicated by the 60-day limit and no part of the problem persisted by allowing the same conduct on the 61st day, the legislation would, of course, have failed.

---

[21] The overinclusive-underinclusive trap is illustrated in the advice given to would-be drafters of revisions to state canons of judicial ethics that general language can be attacked as vague or overbroad, but specific provisions make the canon vulnerable to charges of underinclusiveness. *See* J.J. Gass, After *White*: Defending and Amending Canons of Judicial Ethics 23 (Brennan Center for Justice 2004).

A second reason for some limited deference is that this is a case of competing constitutional interests, so that whatever protection is afforded First Amendment interests comes at the expense of due process and separation of powers interests. *See In re Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1292 (N.Y.2003) ("[A] number of competing interests are at stake, almost all of a constitutional magnitude. Not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption."); Roy Schotland, *Myth, Reality, Past and Present, and Judicial Elections*, 35 Ind. L. Rev. 659, 665 (2002) ("Referring to constitutional rights [in judicial election context], without even mentioning due process, is stunning shallowness."). In the order promulgating the September 2004 version of Canon 5, the Minnesota Supreme Court made this very point: "The goal of maintaining an independent and impartial judiciary is not merely a policy choice, but embodies constitutional principles that are properly counterbalanced against the First Amendment interests that are affected by regulation of elections." *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, slip op. at 4 (Minn. Sept. 14, 2004). Where "constitutionally protected interests lie on both sides of the legal equation," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400, 120 S.Ct. 897, 145 L. Ed. 2d 886 (2000) (Breyer, J., concurring), adoption of an only partly effective regulation may simply be the result of an unavoidable necessity to accommodate conflicting constitutional mandates.

Finally, this is a case in which the parameters of the evil addressed cannot be outlined with a high degree of precision. The difficulty is that the threat to the governmental interest is not from unambiguously evil conduct, but from behavior that forms part of a continuum with desired behavior—attempts of the citizenry to make their voices heard in their government. The critical and difficult question posed by this case is that the danger to judicial neutrality comes from that sometimes salutary behavior, at the point at which participation in the democratic process becomes undue influence over judicial decisionmaking, preventing a judge from acting as the law's representative, rather than as the representative of a political patron or donor. That point will vary from candidate to candidate, according to whether he or she is stubborn or persuadable, experienced or naive, young or old, poor or independently wealthy, ambitious or modest. No law can account for all these imponderables without restricting some candidate who would not have been swayed by temptation or leaving some candidate at liberty to compromise himself.

The Supreme Court acknowledged the same problem in the context of political contribution and expenditure restrictions. The use of money to influence elections and hence, government policy, is not simply either wholesome activism or influence-buying—the same action can partake of both, which is why someone has to decide when a contribution or expenditure goes from being civic activism to a bid for undue influence. For that reason, the Supreme Court has said that regulation of political contributions and expenditures can go beyond forbidding outright bribery to regulation of more subtle forms of conduct that pose the same kind of threat, but in a lesser degree or in a more ambiguous form. This was debated in *McConnell*, where the dissenters contended that bribery laws ought to be enough to protect the government's anti-corruption interest, *see* 540 U.S. at 266, 124 S.Ct. 619 (Thomas, J., concurring and dissenting) and 540 U.S. at 258, 124 S.Ct. 619 (Scalia, J., concurring and dissenting) and 540 U.S. at 292-98, 124 S.Ct. 619 (Kennedy J., concurring and dissenting), but the Court's opinion held that the anti-corruption interest "extends beyond simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment,'" 540 U.S. at 150, 124 S.Ct. 619. When Congress grapples with such a protean concept as "undue influence on an officeholder," the Supreme Court applies strict scrutiny in such a way as to acknowledge that Congress' task requires exercise of some judgment. In contrast to the Supreme Court's approach, our Court today takes a bludgeon to a state's attempt to solve a delicate problem.

IV.

The futility of requiring unattainable precision is illustrated by our Court's treatment of the solicitation clause. The basic scheme of the solicitation clause is to erect the campaign committees as a barrier between the candidate and contributor. As recently as 2002, all but four of the states that had judicial elections prohibited candidates from personally soliciting campaign contributions. Roy Schotland, *Myth, Reality, Past and Present, and Judicial Elections*, 35 Ind. L. Rev. 659, 666 (2002). (Since *White*, several states have amended their rules.[24]). The Court today seems to implicitly approve the concept of the campaign committee as a barrier between contributors and the judge or would-be judge. Yet, in effectuating the concept, there are necessarily details which could be moved an inch one way or another. It is clear that for the candidate to sign letters himself is one way to hack at the wall between the candidate and contributor—presumably, that is why Wersal wants to do it. It is perhaps true that the entire wall would not fall down, but it would be somewhat less effective in achieving the goal of removing personal obligation from the candidate-contributor relation. If each detail of the scheme must be proved as critical, rather than as forming a part of a scheme that works, then each detail, and therefore the scheme as a whole, is foredoomed.

---

[24] Twenty-four states currently prohibit personal solicitation, while six states allow it. The states that now prohibit personal solicitation by the candidate are: Arizona, Ariz. Rule 81, Code of Jud. Cond., Canon 5B(2); Arkansas, Ark. Code of Jud. Cond., Canon 5C(2); Florida, Fla. Code of Jud. Cond., Canon 7C.(1); Idaho, Id. Code of Jud. Cond., Canon 5C(2) (may not solicit "in person"); Illinois, Ill. Code of Jud. Cond., Canon 7B(2); Indiana, Ind. Code of Jud. Cond., Canon 5C(2); Kansas, Kan. S.Ct. Rule 601, Code of Jud. Cond., Canon 7B(2)(c); Kentucky, Ky. Rule 4.300, Code of Jud. Cond., Canon 5B(2); Louisiana, La. Code of Jud. Cond., Canon 7D(1); Michigan, Mich. Code of Jud. Cond., Canon 7B(2); Minnesota, Minn. Code of Jud. Cond., Canon 5B(2); Mississippi, Miss. Code of Jud. Cond., Canon 5C(2); Missouri, Mo. S.Ct. Rule 2.03, Canon 5B(2); New York, N.Y. Judiciary Law, Book 29 App., Canon 5A(5); North Dakota, N.D. Code of Jud. Cond., Canon 5C(2); Ohio, Ohio Code of Jud. Cond., Canon 7(C)(2)(a); Oklahoma, Okla. Code of Jud. Cond., Canon 5C(2); Oregon, Ore. Code of Jud. Cond. R.4-102(D); Pennsylvania, 42 Pa. Cons. Stat. Ann., Code of Jud. Cond., Canon 7(B)(2); South Dakota, S.D. Code of Jud. Cond., Canon 5C(2); Tennessee, Tenn. S.Ct. Rules, Rule 10, Code of Jud. Cond., Canon 5C(2)(a); Washington, Wash. Code of Jud. Cond., Canon 7B(2); West Virginia, W. Va. Code of Jud. Cond., Canon 5C(2); and Wisconsin, Wis. S.Ct. Rule 60.06(4).

States that permit personal solicitation are: California, Cal. Code of Jud. Ethics, Canon 5 (comment.); Georgia, Ga. Code of Jud. Cond., Canon 7B(2) (amended to comply with *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)); Maryland, Md. Rules 16-813, Canon 5 (rescinded effective July 1, 2005); Montana, Mont. Canons of Jud. Ethics; Nevada, Nev. Code of Jud. Cond., Canon 5C(2); New Mexico, N.M. Code of Jud. Cond. R. 21-800B and F (candidates may solicit but not from attorneys or litigants with cases pending before the candidate); North Carolina, N.C. Code of Jud. Cond., Canon 7(B)(4) (amended in response to *White*, *see* Matthew Eisley, *Election Rules Relaxed for Judges: Permission to Solicit Lawyers for Money Brings a Fear of 'Shakedowns'*, 26 Nat'l L.J. No. 7 (Oct. 13, 2003)); and Texas, Tex. Code of Jud. Cond., Canon 4D(1). Alabama adopted a rule in 2004 that does not prohibit but "strongly discourages" personal solicitation. Ala. Canons of Jud. Ethics, Canon 7B(4).

Moreover, while the Court's ruling today seems to attack only one small aspect of the solicitation-restriction scheme, the ruling contains the seeds to strike the whole scheme. Today Wersal asks only to sign solicitation letters himself and to personally ask for money from large groups. However, the Court states that any candidate can flank the campaign committee's confidentiality obligation simply by looking up public records showing who contributed to whom. In light of the Court's underinclusiveness analysis, this reasoning will likely require us to condemn the entire scheme as soon as the next plaintiff asks us to.

In sum, though strict scrutiny must, of course, be strict, it must, at least in some instances, be applied with limited deference to the decisionmaker's exercise of judgment. If we pretend that it is otherwise, we adopt a model for strict scrutiny under which no state's attempt to deal with certain problems can survive, and so very real and dangerous problems must be left unaddressed. Every place where the line is drawn is arguably either overinclusive, because too much activism is restricted, or underinclusive, because too much threat to judicial open-mindedness is tolerated. The courts then occupy the enviable position of not being required to say in advance what line would be permissible, but of being privileged to veto every possible legislative attempt to draw the line because it would have been possible to draw the line somewhere else. If strict scrutiny is simply a way to strike down laws, in which any law is doomed as soon as we invoke strict scrutiny, it is a charade. That is not how the Supreme Court has applied strict scrutiny,[25] nor should we adopt this flawed methodology in our Circuit. Instead, where the states or other branches draw the line in a place which the governmental actor can defend, with convincing evidence, as the place where the threat to its interest becomes the most acute, the measure should pass strict scrutiny, though it might have been possible for another hypothetical decisionmaker to have moved the line an inch in one direction or another.

V.

There can be no question that the interests at stake here are compelling. There are questions of fact—first, as to whether the threat to those interests posed by partisan involvement in judicial elections and personal solicitation of contributions are severe enough to warrant the measures taken by the Minnesota Supreme Court and second, as to whether the particular remedy chosen was truly selected for the asserted reason. I would remand to the district court for trial of these factual questions in light of new evidence of the Minnesota Supreme Court's most recent deliberations on the subject. If the defendants prove by convincing evidence that the threat was as they assert and that the clauses were adopted to remedy that threat, I believe the clauses should be upheld as constitutional. Today's ruling invalidates Minnesota's current attempts to preserve its courts' integrity and public repute without any evidence having been heard on the most recent rule amendments. At the same time, our ruling in effect dooms any future attempt as well by adopting a form of strict scrutiny that no measure will pass. I therefore respectfully dissent.

---

[25] "Strict scrutiny is not 'strict in theory but fatal in fact.'" *Grutter v. Bollinger*, 539 U.S. at 326, 123 S.Ct. 2325.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, ET AL.,
APPELLANTS,
V.
BARRY M. LAZARUS, ET AL.,
APPELLEES,

NOS. 99-4021, 99-4025, 99-4029

May 25, 2004

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

The pending petitions for rehearing en banc are granted, and the court's March 16, 2004, opinion and judgment are vacated. The clerk is directed to set the matter for oral argument before the court en banc during the week of October 18-22, 2004, in St. Paul, Minnesota. The clerk will notify counsel of the date and time of argument when the October calendar is established.

The parties are directed to forward to the clerk twenty-five copies of the supplemental briefs filed pursuant to court's order of October 8, 2002.

Order entered at the Direction of the Court
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION;
INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN
ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION;
YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA
NONPROFIT CORPORATION; MINNESOTA COLLEGE
REPUBLICANS, AN ASSOCIATION,
PLAINTIFFS—APPELLANTS,

GREGORY F. WERSAL, INDIVIDUALLY,
PLAINTIFF,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL,
INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,
PLAINTIFFS—APPELLANTS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,
PLAINTIFF,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN
ASSOCIATION,
PLAINTIFF—APPELLANT,

MUSLIM REPUBLICANS, AN ASSOCIATION; MICHAEL MAXIM,
INDIVIDUALLY; KEVIN J. KOLOSKY, INDIVIDUALLY,
PLAINTIFFS,

V.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF
THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER
SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS
DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR;
CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE
MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY
BOARD, OR HIS SUCCESSOR,
DEFENDANTS—APPELLEES,

MINNESOTA CIVIL LIBERTIES UNION, AMICUS ON BEHALF OF APPELLANT,

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON BEHALF OF APPELLEE.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION; MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION; CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY; GREGORY F. WERSAL, INDIVIDUALLY; CAMPAIGN FOR JUSTICE, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF,

V.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES.

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON BEHALF OF APPELLEE.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN

ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION;
YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA
NONPROFIT CORPORATION; MINNESOTA COLLEGE
REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

GREGORY F. WERSAL, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL,
INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,

PLAINTIFFS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,

PLAINTIFF—APPELLANT,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN
ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION;
MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFFS,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

V.

SUZANNE WHITE, IN HER CAPACITY AS CHAIRPERSON OF
THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER
SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS
DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR;
CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE
MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY
BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES.

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON
BEHALF OF APPELLANTS.

No. 99-4021, 99-4025, 99-4029

Submitted: Dec. 10, 2002
Filed: March 16, 2004

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L. Ed. 2d 694 (2002), the Supreme Court reversed the grant of summary judgment against Gregory Wersal and the other plaintiffs in this suit on their claim that the "announce" clause of Canon 5 of the Minnesota Code of Judicial Conduct violated their First Amendment rights. The Supreme Court remanded to us for further proceedings consistent with its opinion, *Id.* at 788, 122 S.Ct. 2528. We conclude that the Supreme Court's opinion requires us to remand to the district court for entry of judgment in favor of Wersal and the other plaintiffs on their "announce" clause claim. We remand to the district court for consideration of whether its disposition of the plaintiffs' claims based on restriction of partisan activities is consistent with the Supreme Court's opinion. Finally, we remand to the district court for entry of judgment in favor of Suzanne White and the other defendants on plaintiffs' personal solicitation clause claim.

We stated the facts of this case in our earlier opinion, *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), and need not belabor them here, except to say that Wersal was a candidate for election to the Minnesota Supreme Court, who challenged several provisions of Canon 5. Canon 5 prohibits candidates for judicial office from announcing their views on disputed legal and political issues, from engaging in specific partisan political activities, and from personally soliciting campaign contributions. Wersal, together with other plaintiffs associated with his campaign[1] and the state Republican party and affiliated organizations,[2] filed this suit against the Minnesota Lawyers Professional Responsibility Board[3] and the Minnesota Board of Judicial Standards[4] to enjoin enforcement of Canon 5. The district court granted summary judgment to the Lawyers Board and the Judicial Board, holding that each challenged provision of Canon 5 survived First Amendment scrutiny. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999). Wersal and the other plaintiffs appealed.

We affirmed the district court with regard to each of the challenged provisions of Canon 5. 247 F.3d at 885. We subjected the provisions of Canon 5 to strict scrutiny, asking whether the restrictions were narrowly tailored to serve a compelling state interest. *Id.* at 864. We held that the state had compelling interests in protecting the independence and quality of its judiciary, and in preserving public confidence in the judiciary's independence. *Id.* at 864-68. We held that the state had shown the required quantum of evidence that each of those interests was threatened by the practices that Canon 5 regulated. *Id.* at 868-72 (partisan activity restrictions); 876-81 (announce clause); 883-84 (solicitation restrictions). We then held that each of the challenged restrictions was narrowly tailored to serve the interests of judicial independence and quality. *Id.* at 872-76 (partisan activity restrictions); 881-83 (announce clause); 884-85 (solicitation restrictions).

---

[1] Other plaintiffs associated with Wersal were his campaign committee and Republican Party members Cheryl Wersal, Mark Wersal, and Corwin Hulbert. Later, Michael Maxim, who was also a member of the Minnesota Republican Party, and Kevin Kolosky, who was another candidate for judicial office, joined as plaintiffs.

[2] The affiliated organizations were the Indian Asian American Republicans, the Republican Seniors, the Young Republicans League of Minnesota, and the Minnesota College Republicans. The Minnesota African American Republican Council and the Muslim Republicans were later added as plaintiffs.

[3] Named as defendants were the Director of the Minnesota Office of Lawyers Professional Responsibility and the Chair of the Minnesota Lawyers Professional Responsibility Board. The Professional Responsibility Board supervises the Office of Lawyers Professional Responsibility, which investigates and prosecutes ethical violations by lawyer candidates for judicial office.

[4] The actual defendant named was the Chairperson of the Minnesota Board of Judicial Standards. The Board of Judicial Standards enforces the Minnesota Code of Judicial Conduct against judges.

Wersal and the other plaintiffs filed a petition for certiorari presenting three questions:

> 1. Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.
>
> 2. Whether the severe burdens imposed by various provisions of the Minnesota Code of Judicial Conduct unconstitutionally impinge on the right of political parties to endorse candidates for elective judicial office in violation of the freedom of speech, freedom of association, and equal protection of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.
>
> 3. Whether the provision of the Minnesota Code of Judicial Conduct that forbids a candidate for elective judicial office from attending or speaking at any political party gathering—while permitting such a candidate to attend or speak at gatherings of all other

> organizations—unconstitutionally impinges on the freedom of speech, freedom of association, and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The petition did not include a question relating to the solicitation restrictions. The Supreme Court granted certiorari, limited to the first question presented, the challenge to the announce clause.

Justice Scalia's opinion for the Supreme Court asked first whether the Boards had identified a compelling state interest to be served by the announce clause. 536 U.S. at 775-84, 122 S.Ct. 2528. Justice Scalia considered the terms "judicial independence" and "impartiality" to be insufficiently refined, and he divined three distinct meanings for "impartiality." First, the "root meaning" of impartiality "is the lack of bias for or against either *party* to the proceeding." *Id.* at 775, 122 S.Ct. 2528 (emphasis in original). Although Justice Scalia implicitly approved this meaning of impartiality as a compelling state interest, he concluded that the announce clause was not narrowly tailored to serve that interest and in fact was "barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *Id.* at 776, 122 S.Ct. 2528 (emphasis in original).

The second possible meaning of impartiality was "lack of preconception in favor of or against a particular *legal view*." *Id.* at 777, 122 S.Ct. 2528 (emphasis in original). Justice Scalia not only rejected this concept as a compelling state interest, but he considered this sort of impartiality undesirable in a judge. *Id.* ("avoiding judicial preconceptions on legal issues is neither possible nor desirable"). As defined by Justice Scalia, this second meaning of impartiality refers not to a candidate's public actions, but to his or her thoughts. An important point that is not explicit in the Supreme Court opinion is that a restriction on a judicial candidate's speech would be patently ineffective in regulating the candidate's thoughts, even if the state wanted to do so.

The third possible meaning of impartiality was "open-mindedness" or willingness to consider all arguments. "This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *Id.* (emphasis in original). This "open-mindedness" meaning of impartiality appears to be intimately related to the second meaning, lack of preconceptions; whereas the second meaning refers to the judge's view of the substantive issue, the third meaning refers to the judge's attitude toward reconsidering his or her view of the substantive issue. Justice Scalia reserved judgment on whether this third sort of impartiality in a judicial candidate was desirable (not to mention compelling) because he considered the announce clause to be so ineffective a way to achieve "open-mindedness" that this could not have been the state's purpose in adopting the clause. *Id.* at 780, 122 S.Ct. 2528 ("As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

Having rejected the state interests offered by the Boards to justify Canon 5, the Court held: "The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion." *Id.* at 788, 122 S.Ct. 2528.

The first issue we must decide is what instructions to issue with regard to the announce clause. Then, we must decide whether to instruct the district court to reconsider its grant of summary judgment with regard to the partisan activity and solicitation clauses.

I.

The Supreme Court's reversal of the grant of summary judgment for the defendants on the announce clause issue technically leaves open the question of what to do with the plaintiffs' cross-motion for summary judgment. The plaintiffs ask us to remand with instructions to enter judgment for them, and the Boards do not dispute the propriety of this request. Therefore, the district court should enter judgment for the plaintiffs on Count II of their Second Amended Complaint.

II.

Wersal and the other plaintiffs also ask us to reverse the entry of judgment for the Boards and to order entry of judgment in favor of the plaintiffs on the other four counts of their complaint, none of which were before the Supreme Court. The Boards argue that we do not have jurisdiction over the issues as to which the plaintiffs did not seek certiorari (solicitation clause) or as to which the Supreme Court denied certiorari (partisan activity clauses).

When the Supreme Court remands a case to us, we must determine whether the law of the case doctrine applies to issues the Supreme Court did not decide. *See Madison v. IBP, Inc.*, 330 F.3d 1051, 1059 (8th Cir. 2003). The law of the case doctrine dictates that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999) (quotation marks omitted). The doctrine does not apply "when an intervening decision from a superior tribunal clearly demonstrates the law of the case is wrong." *Id.* (quotation marks omitted); *Madison*, 330 F.3d at 1059; *Morris v. American Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993). Where the Supreme Court's reasoning in disposing of one issue in a case affects the validity of our earlier disposition of other issues in the same case, we will reconsider those issues on remand.[5] *See Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000). The law of the case doctrine is discretionary, not jurisdictional. *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L. Ed. 2d 318 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); *Conrod v. Davis*, 120 F.3d 92, 95 (8th Cir. 1997).

The cases the Boards cite to show we lack power to reconsider the partisan activity and solicitation clauses are inapposite. In *Patterson v. City of Newport News*, 364 F.2d 816, 817-18 (4th Cir. 1966), plaintiffs sought to relitigate in federal court a condemnation that had been litigated to final judgment in state court. This was barred as a matter of issue preclusion, not law of the case. In *Fleming v. Lake Delton Dev. Co.*, 267 F.2d 254, 256 (7th Cir. 1959), the court did not decide whether res judicata or law of the case applied, but declined to reconsider the same arguments and the same issues the appellant had already fully litigated. There was no suggestion that the law had changed between the first disposition and the later appeal, as the plaintiffs argue happened in this case.

---

[5] The dissent argues that we err in taking into consideration the law of the case doctrine in determining the disposition of issues as to which the Supreme Court did not grant certiorari and which are not discussed in the Supreme Court's opinion in *White*. In our opinion, we conclude that we must reconsider those issues to determine if the reasoning of our earlier disposition survives the new Supreme Court decision. The dissent takes exception to the words "clearly demonstrates the law of the case is wrong," (quoted in *Madison*, 330 F.3d at 1059). This phrase does not insulate a purely legal question from de novo review. The word "clearly" in this context does not refer to "clear error" review, which applies to questions of fact, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L. Ed. 2d 518 (1985), but to whether the new decision actually has a bearing on other issues in this case that were not directly addressed by the superior tribunal. We do not "defer" to our earlier opinion, as the dissent contends. Where the Supreme Court's reasoning casts doubt on our earlier conclusions, we revisit them, see section IV, *infra*; where the earlier reasoning is not inconsistent with *White*, there is no reason to alter it, see section V, *infra*.

The Boards also argue that the Supreme Court's remand limited our jurisdiction, citing *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960). *Hermann* "stands only for the proposition that upon remand the jurisdiction of an appellate court is limited to those particularized points which were assigned for consideration, *if the mandate was in that form*." *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793-94 (7th Cir. 1977) (emphasis added). When a remand does not contain such a limitation, "[o]ther issues not within the compass of the mandate are thereby not precluded from consideration." *Id.* at 794. The remand in this case stated:

> The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

536 U.S. at 788, 122 S.Ct. 2528. This is the language of a general remand, *Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998), and it does not contain an express or implicit limitation on our jurisdiction of issues that were before us prior to the grant of certiorari, *id.*

The question before us, then, is whether the Supreme Court's decision demonstrates that the law applied by this court or by the district court in deciding the partisan activity or solicitation clause issues was wrong.

III.

In our examination of the partisan activity restrictions, we did not suppose that the restrictions were meant to avoid judicial bias for or against particular parties to the suit, as for instance, if the Republican Party were an actual party to litigation before a judge who was endorsed by the Party or who had announced membership in the Party during his election campaign. Recusal of the judge in such a situation is an obvious less restrictive alternative. Therefore, it does not appear that the partisan activity restrictions would be narrowly tailored to avoid impartiality in Justice Scalia's first sense of the word.

Nor did we, in our earlier opinion, consider whether the partisan activity restrictions tended to avoid election of judges who harbored preconceptions about legal issues and to encourage election of judges whose brains were a *tabula rasa* devoid of experience or opinion. Therefore, we did not base our decision upon vindication of the state's interest in impartiality in Justice Scalia's second sense of the word.

Instead, we focused on what we can now recognize as impartiality in Justice Scalia's third sense of the word: open-mindedness. Moreover, we focused not on lack of open-mindedness in the sense of obstinacy or dogmatism, which are subjective states of mind, but rather on the objectively ascertainable threat to open-mindedness that results from having incurred obligations to entities who, while not actually parties to a case, have made known their desire to see certain cases decided in certain ways. Throughout our discussion of the restrictions on partisan activities, we stressed the possibility that candidates who became indebted to political parties could be or seem to be bound to rule in accord with those parties' platforms, rather than in accord with the record and the law.[6] *See, e.g.*, 247

---

[6] Our focus on the effect of a candidate's obligation to and dependence on a political party explains why we arrive at a different result

F.3d at 870 (citing concurrence in *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579, 581 (Minn. 1939), deploring "accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing party"); 247 F.3d at 872 ("The Minnesota Supreme Court has attempted to prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their

---

than the Northern District of New York, which recently invalidated a portion of the New York Code of Judicial Conduct that prohibited judicial candidates from participating in partisan political activity except for their own campaigns. *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated for abstention*, 351 F.3d 65 (2d Cir. 2003). That court opined: "The only conceivable connection [between the prohibition and judicial independence] would be that engaging in political activity, whether partisan or nonpartisan, would influence a judge's decision toward or against the view espoused, whether it be on an issue of law or as to a party to a proceeding." *Id.* at 88. Although *Spargo*'s reasoning is quite brief, it appears to conclude that the only possible interests served by the code sections are either lack of preconceptions as to issues of law, which the Supreme Court disapproved in *White*, or lack of bias as to a party, which could be better addressed by recusal. *Id.* at 88-89. This reasoning ignores the threat to the interest in open-mindedness resulting from the reality or the appearance of obligation to and dependence on political parties. *Spargo* may have omitted discussion of this interest because New York, unlike Minnesota, has partisan judicial elections, N.Y. Election Law § 6-106 (McKinney 2003), and one could argue that it makes little sense to prohibit partisan political activity by judicial candidates where the State has chosen to tolerate partisan judicial elections. Minnesota, in contrast, has chosen to make its judicial elections nonpartisan, thus demonstrating its concern with the effect of political parties on judicial impartiality. *See Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992).

The New York Court of Appeals disagreed with *Spargo* and upheld the New York restrictions on political activity by judicial candidates as narrowly tailored to serve compelling state interests. *In the Matter of Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1292-93 (2003).

independence. . . ."); *id.* at 876 ("If the judiciary is then expected to review . . . legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it."); *id.* (Political parties "are simply in a better position than other organizations to hold a candidate in thrall."). In its most extreme form, this kind of threat to open-mindedness goes by the name "bribery," which, of course, is forbidden by laws other than Canon 5, and is unquestionably within the state's power to proscribe. We do not mean to suggest that political endorsements are comparable to the payment of money or could be regulated in the same way. However, the underlying problem of candidates for public office incurring obligations which interfere with their performance in office has been recognized as an urgent threat that governments can remedy, even when the problem takes more subtle forms than bribery. *See McConnell v. FEC*, 540 U.S. 93, — - —, 124 S.Ct. 619, 660-61, 157 L. Ed. 2d 491 (2003) (corruption and appearance of corruption extend beyond bribery to other arrangements which create "sense of obligation" in officeholders); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389, 120 S.Ct. 897, 145 L. Ed. 2d 886 (2000) ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money to 'influence governmental action' in ways less 'blatant and specific' than bribery."); *see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 37 L. Ed. 2d 796 (1973) (upholding restraints on executive branch employees' political activities because such activities posed "hazards to fair and effective government."). The partisan activity restrictions of Canon 5 are aimed at forms of obligation which are more subtle than outright corruption, but which the state still has a compelling interest in avoiding in its judiciary.

The Supreme Court left open the possibility that open-mindedness in judicial candidates might be a compelling state interest, so a decision premised upon such an interest has not been shown to be wrong, *see Kinman*, 171 F.3d at 610. After the decision in *White*, the New York Court of Appeals entertained a First Amendment challenge to a section of its Rules Governing Judicial Conduct that prohibited judicial candidates from making certain pledges and promises about their future conduct in office. The New York court applied strict scrutiny and upheld the section based, in part, on New York's compelling interest in open-mindedness. *In re Watson*, 100 N.Y.2d 290, 763 N.Y.S.2d 219, 794 N.E.2d 1, 7 (N.Y. 2003) (per curiam) ("[O]pen-mindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard.")

Although an analysis based on the compelling interest in judicial open-mindedness is not contrary to *White*, another aspect of our analysis of the partisan activity clauses must be reexamined carefully. The Supreme Court held that the announce clause would have been a "woefully underinclusive" method of achieving the goal of electing open-minded judges, and so the announce clause could not be said to be narrowly tailored to serve this goal. 536 U.S. at 780, 122 S.Ct. 2528. It therefore behooves us to look closely at whether the partisan activity clauses are similarly underinclusive.

Our earlier opinion's discussion of the partisan activity clauses, unlike our discussion of the announce clause, specifically addressed the issue of underinclusiveness in a dialogue with the dissent. *Compare* 247 F.3d at 871-72 *with* 247 F.3d at 899-902. The dissent contended that, because

Canon 5 prohibited a candidate from participating in the three specified activities with political parties, but not with other organizations that took an interest in how a candidate would decide certain cases if elected, Canon 5 was fatally underinclusive. 247 F.3d at 900-01. We responded that underinclusiveness is not a ground in its own right for invalidating a law, but that it frequently points to two other defects that are fatal: underinclusiveness may show that the government's interest is not truly compelling, since the government has chosen to leave unchecked a threat to that interest; or else it may show that the government is discriminating on the basis of content, suppressing disfavored speech, while allowing other, favored speech even though it ought to be subject to the same objection as the prohibited speech. 247 F.3d at 871 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51-53, 114 S.Ct. 2038, 129 L. Ed. 2d 36 (1994)). To disprove the existence of this first defect, the government defending a law must "establish the empirical reality of the problems it purports to be addressing." 247 F.3d at 871 (quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493, 117 S.Ct. 2130, 138 L. Ed. 2d 585 (1997) (Souter, J., dissenting)); *see generally Interactive Digital Software v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (For measure to pass strict scrutiny, government defending measure must present substantial supporting evidence of harm.).

To disprove the possibility of content discrimination, the government must show that the speech it has burdened poses a different, more serious threat to its asserted interest than the speech it chose not to regulate. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 45 L. Ed. 2d 125 (1975) ("[E]ven a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions."). For instance, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L. Ed. 2d 652 (1990), Michigan restricted the political expenditures of corporations in support of or opposition to candidates for state office. The compelling interest for such regulation was the concern that entities that amassed wealth in the economic marketplace would parlay that wealth into "unfair advantage in the political marketplace," 494 U.S. at 670, 110 S.Ct. 1391 (Brennan, J., concurring) because their ability to spend corporate money bore no relation to political support for the ideas the corporations spent their money to promote, *id.* at 659-60, 670, 672, 110 S.Ct. 1391. The Chamber of Commerce attacked the Michigan law as underinclusive because it did not regulate expenditures by unincorporated labor unions, which also amassed political war chests. *Id.* at 665, 110 S.Ct. 1391. The Court noted that federal law restricted expenditures by unions, as well as by corporations, *id.* at 665 n. 4, 110 S.Ct. 1391.[7]

Austin rejected the underinclusiveness challenge, reasoning that the corporations enjoyed greater government-conferred legal advantages enhancing their ability to accumulate wealth. 494 U.S. at 665, 110 S.Ct. 1391. These legal advantages of corporate form made a crucial distinction between corporations and unions. Additionally, case law permitted union members to opt out of contributing to the union's political activities, which meant that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 666, 110 S.Ct. 1391. The Michigan law therefore passed strict scrutiny. *Cf. Burson v. Freeman*, 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L. Ed. 2d 5 (1992) (also upholding law on strict scrutiny review against underinclusiveness challenge that law failed to regulate all speech posing same threat; Court reasoned that only the type of speech subject to regulation had been shown to pose threat to compelling interest: "The First Amendment does not require States to regulate for problems that do not exist."); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring in judgment) (underinclusiveness fatal where unregulated speech would cause victim discomfort "at least as great" as that caused by speech that was banned).

---

[7] The Court had discussed in earlier cases a long history of Congressional attempts to address the "war chest" problem posed by corporations and labor unions. *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-09, 103 S.Ct. 552, 74 L. Ed. 2d 364 (1982) (Federal laws accounting for "particular legal and economic attributes of corporations and labor organizations" reflect "a permissible assessment of the dangers posed by those entities to the electoral process."); *accord FEC v. Beaumont*, 539 U.S. 146, 123 S.Ct. 2200, 2206, 156 L. Ed. 2d 179 (2003) (including labor unions in discussion of policies behind regulating corporate campaign contributions); *McConnell v. FEC*, 540 U.S. 93, — - —, 124 S.Ct. 619, 644-45, 157 L. Ed. 2d 491 (2003) (same).

Our analysis of the problem of underinclusiveness in applying strict scrutiny finds strong support in the Supreme Court's most recent campaign finance case, *McConnell v. FEC*, 540 U.S. 93, — - —, 124 S.Ct. 619, 694-98, 157 L. Ed. 2d 491 (2003). In *McConnell*, the Court considered a challenge to section 203 of the Bipartisan Campaign Reform Act of 2002, which in turn amended section 316(b)(2) of the Federal Election Campaign Act of 1971, to prohibit use of corporations' and unions' treasury funds to pay for election advertising. 540 U.S. at — & n. 87, 124 S.Ct. at 695 & n. 87. Because the provision restricted campaign expenditures, it had to be tested by strict scrutiny. *Id.* at 695 (asking whether "compelling governmental interest justifies" measure); *id.* at 766 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies [to section 203]."). The plaintiffs contended that the section was underinclusive because it did not apply to election advertising in the print media or on the Internet. *Id.* at 697. The Court held that the evidence in the case supported the conclusion that television advertising posed the greater threat, and therefore the "record amply justifie[d] Congress' line drawing." *Id.* The Court said that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 105, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976)). *McConnell* thus confirms our earlier reasoning that the sort of underinclusiveness that is fatal in strict scrutiny is irrational underinclusiveness, not underinclusiveness that results from attempting to focus the restriction on only the severest form of the threat to a compelling governmental interest.

Although our method of analyzing the underinclusiveness issue remains valid, we must examine whether the actual application was affected by anything in the *White* decision. The Supreme Court's discussion of the announce clause affected both the necessity and narrow tailoring aspects of our determination that the partisan activity clauses passed strict scrutiny. First, our determination that the Boards had shown the necessity of the restrictions depended partly on our view of the history of Minnesota's effort to extricate its judiciary from partisan pressures, initially by designating judicial elections as non-partisan, and later by adopting Codes of Judicial Conduct restricting partisan activities. 247 F.3d at 869-70. We concluded that "'a long history, a substantial consensus, and simple common sense' combine to show that regulation is necessary to protect the institution of the judiciary from the dangers of partisanship and corruption." *Id.* at 870-71 (quoting *Burson*, 504 U.S. at 211, 112 S.Ct. 1846). However, the Supreme Court rejected our reliance on similar considerations supporting the announce clause. 536 U.S. at 785, 122 S.Ct. 2528 ("The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal."). Moreover, the Court's discussion included language that has obvious relevance to the history of the partisan activity clauses. *Id.* at 786, 122 S.Ct. 2528 ("Thus, not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail [throughout the 19th and first quarter of the 20th centuries], but they were touting party affiliations and angling for party nominations all the while."). Therefore, it is necessary to reconsider whether the partisan activities clauses are supported by sufficient evidence of necessity, without the reliance we placed on the history of Minnesota's efforts to protect its judiciary from partisan pressures.

Second, our conclusion that the Minnesota Supreme Court was justified in regulating candidate speech concerning political parties, while leaving unregulated comparable speech concerning single issue groups depended in part on the existence of the announce clause. 247 F.3d at 876 ("At the Minnesota Supreme Court's 1997 hearing on amending Canon 5, DePaul Willette, Executive Secretary of the Judicial Board, testified that the danger of judicial candidates affiliating with single-issue interest groups was adequately addressed by the provision of Canon 5 prohibiting announcement of the candidate's views on disputed legal or political issues."). Therefore, the evidence supporting Minnesota's distinction between political and other organizations must be reevaluated in light of the demise of the announce clause.

Third, our original underinclusiveness analysis discussed only whether the partisan activity restrictions were underinclusive because they reached speech pertaining to political parties, but not other organizations. We concluded the distinction between burdened speech and non-burdened speech was justified because political parties posed a more pervasive threat to judicial independence than did other types of organizations. 247 F.3d at 872, 875-76. *Cf. McConnell*, 540 U.S. at —, 124 S.Ct. at 686 ("Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group.") (citation omitted).

The Supreme Court's opinion raised an entirely different underinclusiveness objection:

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

536 U.S. at 779, 122 S.Ct. 2528. This type of underinclusiveness analysis looks at whether banning certain communications within one time-frame but not another is arbitrary. The same analysis could be applied to other clauses of Canon 5, such as the party identification and attendance at party gatherings clauses. (The endorsement clause only makes sense during the time-frame of an election.) This particular underinclusiveness question was not briefed either before the district court or before us when we decided this case the first time. The plaintiffs ought not to be barred from making a new argument based on the intervening Supreme Court decision, *see Morris v. Am. Nat'l Can Corp.*, 988 F.2d at 52 (litigant who did not raise argument on first appeal "got lucky" when Supreme Court case changed law before its case became final), but neither should the Boards be prevented from marshaling

whatever evidence they choose to present on this issue, as they asked to do at oral argument on remand from the Supreme Court. We therefore remand to the district court to receive new evidence and to determine whether the partisan activity clauses can survive strict scrutiny in light of the Supreme Court's opinion.

IV.

The plaintiffs contended that the solicitation clause of Canon 5 was not narrowly tailored in that it unnecessarily prohibited candidates from soliciting contributions from large groups and sending out fund-raising letters over their own signatures. 247 F.3d at 883-84. We held that personal solicitation by candidates could create the impression that justice is for sale and Canon 5 left a candidate sufficient means by which to raise funds. *Id.* at 884-85. Plaintiffs did not seek certiorari on this issue. We conclude, however, that failure to seek certiorari on the issue does not now preclude the plaintiffs from asking for reconsideration of the issue in light of the Supreme Court's opinion. *See Morris v. American Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993).

As with the partisan activities clauses, our consideration of Canon 5's restriction on personal solicitation was also premised on the state's interest in a kind of open-mindedness—keeping candidates free from obligations that would hamper their ability to decide the law according to their own judgment, rather than in accordance with implicit obligations to their financial benefactors. We said: "When judges obtain funds from a group that has an interest in the outcome of litigation, such as the plaintiffs' or defendants' bar, judges can appear beholden to that group for their accession to office, creating the expectation that the judges will favor their benefactors accordingly." 247 F.3d at 883. We cannot, then, say that our opinion was wrong in discerning a compelling state interest served by the personal solicitation restriction.

We considered whether the personal solicitation restriction was narrowly tailored in our original opinion. *Id.* at 884-85. Nothing in the Supreme Court's opinion discredits our analysis of this issue. *Cf. In re Dunleavy*, 838 A.2d 338, 350-51 (Me. 2003) (upholding restriction on judges' solicitation of support for political candidates after *White* as narrowly tailored), *pet'n for cert. filed* (Jan. 20, 2004) (No. 03-1132). Our holding on the issue is therefore not wrong. The plaintiffs cite the Eleventh Circuit's opinion in *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002), invalidating Georgia Canon of Judicial Conduct 7(B)(2), which prohibited judicial candidates from personally soliciting campaign contributions. The Canon did allow the candidate's election committee to solicit funds. *Id.* at 1322. The Eleventh Circuit's holding on this issue was based on the fact that the Canon would not prevent the candidate from learning who had contributed to his campaign and consequently from feeling beholden to those contributors. Accordingly, it was ineffective in protecting the state's asserted compelling interest. Minnesota's Canon 5B(2), on the other hand, prohibits a candidate's campaign committee from disclosing to the candidate either the identity of campaign contributors or the identity of those who were solicited for contributions but declined to contribute. The *Weaver* rationale is therefore inapplicable to the Minnesota Canon.[8] We need not comment on the conclusion expressed in *Weaver* that the distinction between judicial elections and other types of elections "if there truly is one," 309 F.3d at 1321, does not justify "greater restrictions on speech during judicial campaigns than during other types of campaigns." *Id. Cf. White*, 536 U.S. at 783, 122 S.Ct. 2528 ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.") We have no need to revisit our consideration of the personal solicitation clause.

---

[8] The dissent argues that because Canon 5B(2) prohibits the campaign committee from disclosing to the candidate the names of contributors and decliners, there is no compelling interest in prohibiting the candidate from signing his own solicitation letters. If the request comes from the candidate himself rather than the committee, it is natural to expect contributors to respond to the candidate rather than the committee, which would undermine the Canon's design of interposing the committee as the intermediary between candidate and contributors.

* * * * * *

We remand with instructions to the district court to enter judgment for the plaintiffs on Count II of the Second Amended Complaint (announce clause), to enter judgment for the defendants on Counts V (solicitation clause), and to reconsider its ruling on Counts I, III and IV (partisan activities clauses) in light of the Supreme Court's decision in this case and such further evidence as the parties may offer.

BEAM, Circuit Judge, concurring and dissenting.

I concur in the court's conclusion that the district court must enter judgment for Gregory Wersal and the other plaintiffs (collectively plaintiffs) on their "announce clause" claim. I believe that the plaintiffs are also entitled to judgment on their "partisan activities" and "personal solicitation" claims. Accordingly, I dissent from the court's holdings on these issues.

I begin by again noting that Minnesota's decision to popularly elect judges invokes the need to fully and strictly apply the requirements of the First Amendment, including the Amendment's speech and associational mandates. If Minnesota wants judicial elections, it must provide the constitutional trappings required for such procedures. As Justice O'Connor noted in her concurrence above, Minnesota cannot ignore the "'crocodile [it has chosen to place] in [its] bathtub.'" *Republican Party v. White*, 536 U.S. 765, 789, 122 S.Ct. 2528, 153 L. Ed. 2d 694 (2002) (quoting former California Supreme Court Justice Otto Kaus). Yet today, the court permits the State to do just that.

I adhere to the views expressed in my previous dissent, *see*, 247 F.3d at 885-903, and fully incorporate my remarks by reference. But this case's present posture requires a further and different inquiry: What must we do on remand? In considering this question, the court misdefines our task and renders a decision that violates both the Supreme Court's mandate and the First Amendment.

I. Our Task on Remand

The court (sometimes referred to as the panel majority or majority) gives great weight to its previous decision. This is error. The last time this case was before us, the panel majority, over my dissent, upheld the solicitation clause, the partisan-activities clause, and the announce clause. The Supreme Court granted certiorari to consider the announce clause. It reversed, explained why it reversed, and remanded the *case* for proceedings consistent with its opinion. *White*, 536 U.S. at 788, 122 S.Ct. 2528. On remand, instead of simply asking what the Court's order and opinion command, the majority clouds our task by misapplying the law-of-the-case doctrine.[9]

---

[9] Footnote 5 of the court's opinion further muddies the water. First, the court writes that we apply the law of the case unless intervening authority clearly demonstrates that the law of the case was wrong. Next, the court cites *Shrink*, a case that never mentioned the doctrine. Then, the court ultimately concludes that the "clearly demonstrates" language is merely a redundant statement of the *Shrink* rule, which allows for a de novo review of legal questions. To the extent that footnote 5 suggests that the court is conducting a de novo review of the panel's previous opinion in light of the Supreme Court's teachings, I agree with that footnote. But I am not convinced that the opinion's text says or means what the footnote suggests, and in any event, the footnote does not accurately describe the way the court actually applies the doctrine.

We owe no deference to the court's earlier decision. The Supreme Court ordered us to proceed consistently with its opinion. Our only task on remand should be to ensure that we render, remand, or vacate consistently with the Supreme Court's mandate:

> A corollary to the principle that a mandate is completely controlling as to all matters within its compass is the rule that, upon a reversal and remand for further consistent proceedings, the case goes back . . . for a new determination of the issues presented *as though they had not been determined before*, pursuant to the legal principles enunciated in the . . . opinion.

Poletti v. C.I.R., 351 F.2d 345, 347 (8th Cir. 1965) (emphasis added). This de novo review is absolute because, when the mandate tells a lower court to proceed consistently with an opinion, the opinion and its teachings become part of the mandate. *Bailey v. Henslee*, 309 F.2d 840, 843 (8th Cir. 1962); *see Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985).

Although the court cites a case that proceeded properly on remand, *Shrink Missouri Government PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000), *Shrink* does not support the court's actions. The court cites *Shrink* for the proposition that "[w]here the Supreme Court's reasoning in disposing of one issue in a case affects the validity of our earlier disposition of other issues in the same case, we will reconsider those issues on remand." *Ante* at 1042 [96a-97a]. Then, the court defines our task as determining whether "the law applied by this court or by the district court in deciding the partisan activity or solicitation clause issues was wrong." *Ante* at 1043 [98a]. But the court ultimately departs from any permissible interpretation of the law-of-the-case doctrine (or any other standard of review I can find). Two problems evidence this departure. First, the court defers to a ruling that no court has ever made. And second, the court adheres to rulings it made before, even though the Supreme Court's new teachings require precisely the opposite rulings. I address each in turn.

II. The Court Defers to a Ruling it Never Made

Although it is undisputed that both the partisan-activities and solicitation clauses must be justified by a compelling state interest, and although these clauses restrict core, political, election speech, the last time this case was before the court, the panel majority upheld the restrictions based on an interest it forgot to define.

> The Court of Appeals concluded that [Minnesota] had established two interests as sufficiently compelling . . . preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. . . . [A]lthough the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it.

White, 536 U.S. at 775, 122 S.Ct. 2528. So the Supreme Court defined impartiality for us, and left open the *possibility* that judicial "openmindedness" is or might become a compelling state interest.

Even though the panel majority did not define "impartiality" or "openmindedness" in the previous appeal, it does not return to this compelling-state-interest question. Instead, the majority claims to have exercised remarkable foresight and near-psychic precision when it states today that it earlier "focused on what we can now recognize as impartiality in Justice Scalia's third sense of the word: open-mindedness."[10] *Ante* at 1043 [99a].

---

[10] A computer scan of the majority's previous opinion fails to disclose its use of the words "openminded" or "openmindedness" in any definitional discussion of the words impartiality or judicial impartiality.

This stunning metamorphosis to the determinations the panel now says it made in its previous opinion presents, to borrow Justice Scalia's words, "a challenge to the credulous." *White*, 536 U.S. at 780, 122 S.Ct. 2528. And the majority further states that because the Supreme Court left open the *possibility* that openmindedness might be a compelling state interest, its supposed reliance upon such an interest was not shown to be wrong. *Ante* at 1044 [99a-100a]. This self-serving analysis is fatally incorrect for obvious reasons. The analysis focuses on the recognition of a newly minted compelling state interest that the Supreme Court scolded the majority for not finding or defining.

When the government suppresses election speech, the Constitution demands strict scrutiny; that is, a narrowly tailored restriction designed to serve a compelling state interest. *White*, 536 U.S. at 774-75, 122 S.Ct. 2528. Yet the panel majority, in neither its previous effort nor in today's opinion, has discussed how or why "openmindedness" is a compelling state interest that can be used to suppress election speech and associational activities. Neither did Justice Scalia.

As already noted, in its earlier opinion, the panel majority simply asserted that judicial impartiality (a term it forgot to define) was a compelling state interest. Only later did the Supreme Court define impartiality for us. And while the Supreme Court acknowledged openmindedness as *a possible* use as a subset of the word impartiality, and acknowledged the *possibility* that that possible subset was a compelling state interest, the panel today claims earlier reliance on this later-defined interest and, without further discussion, declares that it previously found this undefined interest compelling. If the panel's present statements accurately describe its earlier holdings, then one of the following statements must be true: either the Supreme Court missed the panel's previous message, or the previous panel was able to examine an undefined term so closely as to label it compelling. But neither is true. Our role as an inferior court requires that we reject the first option. And we must reject the second because the very ideas of fundamental rights and strict scrutiny require that before we deem an interest compelling, we must know what that interest is. Because neither statement is true, the court's opinion misstates what occurred.

The Supreme Court refused to pursue this crucial question because it did not believe that the Minnesota Supreme Court had adopted the "announce" clause for the purpose of protecting the openmindedness of judges. There is even less chance (hardly any chance at all) that the Minnesota court adopted the partisan-activities and solicitation restrictions to protect judicial "openmindedness." Indeed, there is almost no readily discernible connection between the words contained in these restrictions and "how a [judicial] candidate would decide certain cases if elected." *Ante* at 1044 [103a].[11]

So, as a fundamental first step, we should ask whether "openmindedness" is a compelling state interest at all.[12]

---

[11] This is especially true with the solicitation clause, as shown by the panel majority's rejection of *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down solicitation clause). The majority opinion states that because the solicitation clause considered by the Eleventh Circuit did not prohibit the candidate from knowing of solicitation responses or declinations, as does the Minnesota rule, the Minnesota version passes muster. If this is correct, the disconnect between the rule and judicial openmindedness is all the more obvious.

[12] The New York Court of Appeals's Watson decision—which of course does not bind us—adds nothing to this case. *See ante* at 1045 (citing *In re Watson*, 100 N.Y.2d 290, 763 N.Y.S.2d 219, 794 N.E.2d 1, 7 (2003) (per curiam)). In *Watson*, the defendant defined impartiality, and the plaintiff did not dispute that interest's compelling status. *In re Watson*, 763 N.Y.S.2d 219, 794 N.E.2d at 6. The fact that the *Watson* court reached this uncontested conclusion does not

After all, the Supreme Court left open only the possibility that openmindedness, as a desirable judicial trait, rises to the level of a "compelling state interest." The Supreme Court did not find it to be so and, upon proper consideration, it may be found to fall well short of the fundamental interest necessary to fit into this constitutional category.

Then, because we have never scrutinized the restrictions under the only interest that can possibly support them (openmindedness), we should do so now. We should ask, for example, whether preventing a judge from sending his or her own fund-solicitation letter is necessary to preserve the judges "willing[ness] to consider views that oppose [existing] preconceptions, and remain open to persuasion, when the issues arise in a pending case," the hallmarks of "openmindedness" according to Justice Scalia. *White*, 536 U.S. at 778, 122 S.Ct. 2528. This is especially true when Minnesota forbids the judge from learning of a solicitee's response or lack thereof. But, beyond this question, it is my view that the solicitation clause is unconstitutional for a more specific reason. The only way the solicitation clause survives strict scrutiny is if it is necessary and narrowly tailored to further the compelling state interest of judicial openmindedness. The Minnesota canon does *not* allow a judge to even sign a solicitation request. This is one aspect of a more complicated rule purportedly designed to protect the state's interest. But this part of the restriction renders the law not narrowly tailored. Stated another way, in a state where a judge cannot learn of his donors, to keep the judge's mind "open," must the state prohibit the judge from even signing solicitation letters? Of course not.[13]

---

magically insert an analysis into the void left by the panel majority's previous decision.

[13] Footnote 8 shows just how forgiving the court views the strict-scrutiny standard; indeed, the court's language appears better suited for rational-basis review. The court asserts that the ban on personal

III. Underinclusiveness and the Partisan-Activities Clause

Nor do I understand, even under its misguided application of the law-of-the-case doctrine, how the panel can adhere to its view that underinclusiveness is not an independent ground to challenge a restriction on election speech (and now, by analogy, partisan activities). I simply questioned this premise in my earlier dissent, but Justice Scalia defenestrated it in *White*: "A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." 536 U.S. at 780, 122 S.Ct. 2528 (internal marks and citations omitted). But the panel now agrees with neither Justice Scalia nor with me.[14]

The majority's view on underinclusiveness is an interesting but unsupportable position because I am certain that Justice Scalia meant what he wrote in *White*. His words bear repeating: "A law [here the partisan-activities restriction] *cannot* be regarded as protecting an interest of

---

solicitation is justified because "it is natural to expect contributors to respond to the candidate rather than the committee" if the candidate signs the letter. This footnote is wrong because it assumes that either candidates will violate the law or that their contributors will not follow the candidate's direction to reply in the way the law allows. Why is it not "natural to expect" that candidates will obey the law and direct replies to the committee, as the rules require? And why would we expect the contributors to do anything but obey the candidate's direction? The record does not even approach answering (or even asking) these questions. The court fails to realize the significance of strict scrutiny—and its burden-of-proof allocation—when it chooses, by default, the speech-suppressing answer based on its own unsupported hypothesis.

[14] Perhaps the court does not feel this language is binding. In *White*, Justice Scalia wrote for the Court and cited that language from one of his concurring opinions. The fact that the language used to be non-binding does not change the fact that it is now the law.

the highest order [possibly a judge's openmindedness] . . . when it leaves appreciable damage to that . . . interest unprohibited." *Id.* The panel apparently does not dispute that we must strike down the partisan-activities clause unless we regard it as protecting an interest of the highest order. But somehow (and I admit I do not see how) the court feels free to finesse this Supreme Court language to allow the partisan-activities clause to purport to protect judicial openmindedness even though the clause leaves appreciable damage (affiliation with and the support from other special-interest groups) unprohibited.[15] The facts

---

[15] Even though Justice Scalia wrote the applicable rule in this very case when the Court reversed the first time, the majority today ignores that language and instead relies upon *McConnell v. FEC*, 540 U.S. 93, — - —, 124 S.Ct. 619, 694-98, 157 L. Ed. 2d 491 (2003). That reliance puzzles me. First, I don't understand why the court today pieces together blurbs from that several-hundred-page opinion, when Justice Scalia wrote a clear, one-sentence rule. Remarkably, even though the Supreme Court decided *McConnell* shortly after it decided *White*, and even though the McConnell opinion contained hundreds of pages and more citations than I care to count, the *McConnell* opinion didn't cite *White*. I am quite certain that the Supreme Court did not overlook *White* when it wrote *McConnell*. Instead, it recognized that the two cases were so different as to not even justify a single citation. But this distinction does not dissuade the court today. When the puzzle pieces seem out of place, the court pounds them until they wedge together; the problem is, the pieces are not only in the wrong place, but they are from the wrong puzzle.

Even this patchwork formulation doesn't support the court's holding. In *McConnell*, the "Court held that *the evidence* in the case supported the conclusion that television advertising posed the *greater threat*, and therefore the record amply justifie[d] Congress' line drawing." *Ante* at [106a] (citing *McConnell*, 540 U.S. at —, 124 S.Ct. at 697) (emphasis added and internal quotations omitted). Determining which threat is "greater" requires a comparison of the two threats. In its previous opinion, the panel majority purported to examine the threats presented by association with political parties, concluded they were not arbitrary, cited inapplicable cases that establish the probability of greater harm to judicial

---

support treating political parties differently, and held that the State had satisfied its heavy burden. But the panel majority never discussed (and it does not discuss today) the threats that special-interest-group association pose, even though the record highlights this problem. It certainly fails to discuss "ample" record evidence (past or present) that supports the idea that political association presents a greater threat to judicial openmindedness than special-interest association. Indeed, the record, including a Minnesota Supreme Court hearing conducted when the court was amending the ethical rules, shows that special-interest-group association posed *at least* as great a threat. *See Hearing on the Amendment to Canon 5 of the Code of Judicial Conduct*, C7-81-300, Tr. at 36-37, 40 (Minn. Nov. 19, 1997) (Minnesota District Judge Gary Meyer testifying) (The rule "allows a candidate for the judiciary to seek and use the endorsements of such special interest groups as the National Rifle Association, the Minnesota Citizens Concerned for Life, the National Organization for Women, Mothers Against Drunk Drivers, or any labor union. Clearly, organizations such as these can and frequently do support and oppose candidates for political office. . . . It appears that the proposed changes to [the rule] are an attempt to strip political affiliation from judicial elections, but at the same time, they allow and perhaps encourage candidates to adopt issue group affiliation. This doesn't take party politics out of the judicial election. . . . Is it appropriate for a judicial candidate to speak and appear at a MADD . . . function but not a political party? Why should these special interest endorsements and activity be protected as constitutionally guaranteed free speech and assembly but political party endorsements and activity not be so protected.").

We should not remand to the district court to allow it to review the record for evidence that is not there. There simply is not "ample" record evidence to show that this line drawing is necessary to advance the state's interest in an openminded judiciary, or in the appearance of an openminded judiciary. In a gun-control case, how is the candidate's openmindedness more affected by his political affiliation than his NRA affiliation? In an abortion case, would association with a political party influence judicial minds more than association with pro-life or pro-choice groups? To justify the restriction, even the court's proposed rule requires a "yes" answer to these questions. Because neither logic nor the record supports a "yes" answer, the Constitution forbids the line drawing.

openmindedness from association with these other narrowly focused, politically active groups who have persistent interest in many of the cases an elected judge may be called upon to decide in the Minnesota courts.[16]

Even so, the majority never examines whether these other political contacts pose an "appreciable danger." If a law cannot pass strict scrutiny when it leaves an appreciable danger unprohibited, the starting place must be to ask whether an appreciable danger exists at all and, if so, does the law leave it unprohibited? This is the essence of the "underinclusiveness" inquiry and it clearly *is* an independent ground for challenging the restriction. And although the panel correctly notes that the underinclusiveness challenge clearly points toward two other fatal defects in the Minnesota law, the unprotected-appreciable-danger challenge stands on its own and defeats the Minnesota rule.

In short, although the panel's interpretation of Supreme Court underinclusiveness jurisprudence is inventive, I choose Justice Scalia's binding interpretation of the law. The Minnesota partisan-activities clause, as presently written, violates the Constitution.

IV. CONCLUSION

The panel majority uses the discretionary, judicial-economy-based, law-of-the-case doctrine to reach an unsupportable result. Minnesota has failed to establish a "compelling state interest," at least one with a discernible connection to the regulations at issue. One regulation is woefully underinclusive and the other overly broad but with no real connection to a constitutionally protectable interest. The majority construes its previous ruling as deciding a question that did not exist when the decision was rendered. And, the panel defers to its own hypothetical ruling instead of applying the mandate of the Supreme Court. For these reasons, and those expressed in my previous dissent, I concur in the court's invalidation of the Minnesota Supreme Court's announce clause, but dissent from the court's failure to invalidate the partisan-activities and solicitation restrictions.

---

[16] In this regard, I take judicial notice, for instance, of candidate filings contained in Minnesota Board of Campaign Finance and Public Disclosure Reports for year 2000 and in Minnesota media reports that reveal that large law firms and their members contribute substantial sums of money to judicial candidates, especially incumbent candidates, as well as to non-judicial candidates for state and federal office. *See In re Ahlers*, 794 F.2d 388, 392 n. 1 (8th Cir. 1986) (permitting consideration of matter outside the record on appeal), *rev'd on other grounds sub nom. Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 99 L. Ed. 2d 169 (1988).

APPENDIX D

UNITED STATES SUPREME COURT

REPUBLICAN PARTY OF MINNESOTA, ET AL.
PETITIONERS,

v.

SUZANNE WHITE, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANDARDS, ET AL.

No. 01-521

Argued March 26, 2002
Decided June 27, 2002

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

I

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, § 7. Since 1912, those elections have been nonpartisan. Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4-6. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i)(2000). This prohibition, promulgated by the Minnesota Supreme Court and based on

Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct"). Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation. Rule 8.4(a); Minn. Rules on Lawyers Professional Responsibility 8-14, 15(a) (2002).

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board,[1] investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.[2]

---

[1] The Eighth Circuit did not parse out the separate functions of these two entities in the case at hand, referring to the two of them collectively as the "Lawyers Board." We take the same approach.

Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents,[3] seeking, *inter alia*, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. The parties filed cross-motions for summary judgment, and the District Court found in favor of respondents, holding that the announce clause did not violate the First Amendment. 63 F. Supp. 2d 967 (D. Minn. 1999). Over a dissent by Judge Beam, the United States Court of Appeals for the Eighth Circuit affirmed. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (2001). We granted certiorari. 534 U.S. 1054, 122 S.Ct. 643, 151 L. Ed. 2d 561 (2001).

---

[2] Nor did Wersal have any success receiving answers from the Lawyers Board when he included "concrete examples," *post*, at 2547 [156a], n. 2 (STEVENS, J., dissenting), in his request for an advisory opinion on other subjects a month later:

"As you are well aware, there is pending litigation over the constitutionality of certain portions of Canon 5. You are a plaintiff in this action and you have sued, among others, me as Director of the Office of Lawyers Professional Responsibility and Charles Lundberg as the Chair of the Board of Lawyers Professional Responsibility. Due to this pending litigation, I will not be answering your request for an advisory opinion at this time." App. 153.

[3] Respondents are officers of the Lawyers Board and of the Minnesota Board on Judicial Standards (Judicial Board), which enforces the ethical rules applicable to judges.

II

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002).

We know that "announc[ing] . . . views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," *ibid.*—a prohibition that is not challenged here and on which we express no view.

There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text. The statements that formed the basis of the complaint against Wersal in 1996 included criticism of past decisions of the Minnesota Supreme Court. One piece of campaign literature stated that "[t]he Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." App. 37. It went on to criticize a decision excluding from evidence confessions by criminal defendants that were not tape-recorded, asking "[s]hould we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" *Ibid.* It criticized a decision striking down a state law restricting welfare benefits, asserting that "[i]t's the Legislature which should set our spending policies." *Ibid.* And it criticized a decision requiring public financing of abortions for poor women as "unprecedented" and a "pro-abortion stance." *Id.*, at 38. Although one would think that all of these statements touched on disputed legal or political issues, they did not (or at least do not now) fall within the scope of the announce clause. The Judicial Board issued an opinion stating that judicial candidates may criticize past decisions, and the Lawyers Board refused to discipline Wersal for the foregoing statements because, in part, it thought they did not violate the announce clause. The Eighth Circuit relied on the Judicial Board's opinion in upholding the announce clause, 247 F.3d, at 882, and the Minnesota Supreme Court recently embraced the Eighth Circuit's interpretation, *In re Code of Judicial Conduct*, 639 N.W.2d 55 (Minn. 2002).

There are yet further limitations upon the apparent plain meaning of the announce clause: In light of the constitutional concerns, the District Court construed the clause to reach only disputed issues that are likely to come before the candidate if he is elected judge. 63 F. Supp. 2d, at 986. The Eighth Circuit accepted this limiting interpretation by the District Court, and in addition construed the clause to allow general discussions of case law and judicial philosophy. 247 F.3d, at 881-882. The Supreme Court of Minnesota adopted these interpretations as well when it ordered enforcement of the announce clause in accordance with the Eighth Circuit's opinion. *In re Code of Judicial Conduct, supra.*

It seems to us, however, that—like the text of the announce clause itself—these limitations upon the text of the announce clause are not all that they appear to be. First, respondents acknowledged at oral argument that statements critical of past judicial decisions are *not* permissible if the candidate also states that he is against *stare decisis*.

Tr. of Oral Arg. 33-34.[4] Thus, candidates must choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis*. Or, to look at it more concretely, they may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions. Second, limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all. One would hardly expect the "disputed legal or political issues" raised in the course of a state judicial election to include such matters as whether the Federal Government should end the embargo of Cuba. Quite obviously, they will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts. And within that relevant category, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (C.A. 7 1993). Third, construing the clause to allow "general" discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "'strict constructionist.'" Tr. of Oral Arg. 29. But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the

---

[4] Justice GINSBURG argues that we should ignore this concession at oral argument because it is inconsistent with the Eighth Circuit's interpretation of the announce clause. *Post*, at 2553 [167a] (dissenting opinion). As she appears to acknowledge, however, the Eighth Circuit was merely silent on this particular question. *Ibid*. Silence is hardly inconsistent with what respondents conceded at oral argument.

Constitution. Respondents conceded that the announce clause would prohibit the candidate from exemplifying his philosophy in this fashion. *Id.*, at 43. Without such application to real-life issues, all candidates can claim to be "strict constructionists" with equal (and unhelpful) plausibility.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.[5]

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and

---

[5] In 1990, in response to concerns that its 1972 Model Canon—which was the basis for Minnesota's announce clause—violated the First Amendment, see L. Milord, The Development of the ABA Judicial Code 50 (1992), the ABA replaced that canon with a provision that prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Judicial Conduct, Canon 5(A)(3)(d)(ii) (2000). At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. Tr. of Oral Arg. 38. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. Final Report of the Advisory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5-6 (June 29, 1994), reprinted at App. 367-368. The ABA, however, agrees with respondents' position. Brief for ABA as *Amicus Curiae* 5. We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question.

"how [he] would handle administrative duties if elected." Brief for Respondents 35-36. Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Minnesota State Bar Association Judicial Elections Task Force Report & Recommendations, App. C (June 19, 1997), reprinted at App. 97-103. Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

III

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms"—speech about the qualifications of candidates for public office. 247 F.3d, at 861, 863. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, *id.*, at 864; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L. Ed. 2d 271 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression." *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L. Ed. 2d 732 (1982).

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. 247 F.3d, at 867. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary.[6] Respondents are rather vague, however, about what they mean by "impartiality." Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

A

One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process.

---

[6] Although the Eighth Circuit also referred to the compelling interest in an "independent" judiciary, 247 F.3d, at 864-868, both it and respondents appear to use that term, as applied to the issues involved in this case, as interchangeable with "impartial." See *id.*, at 864 (describing a judge's independence as his "ability to apply the law neutrally"); Brief for Respondents 20, n. 4 ("[J]udicial impartiality is linked to judicial independence").

Tumey v. Ohio, 273 U.S. 510, 523, 531-534, 47 S.Ct. 437, 71 L. Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L. Ed. 2d 823 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L. Ed. 2d 423 (1971) (*per curiam*) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139, 75 S.Ct. 623, 99 L. Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.[7]

---

[7] Justice STEVENS asserts that the announce clause "serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality." *Post*, at 2548 [158a]. We do not

B

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 34 L. Ed. 2d 50 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived

---

disagree. Some of the speech prohibited by the announce clause may well exhibit a bias against parties—including Justice STEVENS's example of an election speech stressing the candidate's unbroken record of affirming convictions for rape, *ibid.* That is why we are careful to say that the announce clause is "*barely* tailored to serve that interest," *supra*, at 2535 [132a] (emphasis added). The question under our strict scrutiny test, however, is not whether the announce clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest. It is not.

views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.* The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, § 5 ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

C

A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. See, *e.g.*, *Laird*, *supra*, at 831-833, 93 S.Ct. 7 (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes's authorship of the opinion overruling *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L. Ed. 785 (1923), a case he had criticized in a book written before his appointment to the Court). More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) ("A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law . . ."); Minn. Code of Judicial Conduct, Canon 4(B), Comment. (2002) ("To the extent that time permits, a judge is encouraged to do so . . ."). That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53, 114 S.Ct. 2038, 129 L. Ed. 2d 36 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J. F.*, 491 U.S. 524, 541-542, 109 S.Ct. 2603, 105 L. Ed. 2d 443 (1989) (SCALIA, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).

Justice STEVENS asserts that statements made in an election campaign pose a special threat to open-mindedness because the candidate, when elected judge, will have a *particular* reluctance to contradict them. *Post*, at 2548 [156a-157a]. That might be plausible, perhaps, with regard to campaign *promises*. A candidate who says "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages" will positively be breaking his word if he does not do so (although one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign "pledges or promises," which is not challenged here. The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice. In any event, it suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests. See, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S.Ct. 1535, 56 L. Ed. 2d 1 (1978) (rejecting speech restriction subject to strict scrutiny where the State "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined"); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-825, 120 S.Ct. 1878, 146 L. Ed. 2d 865 (2000) (same).[8]

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. *Eu*, 489

---

[8] We do not agree with Justice STEVENS's broad assertion that "to the extent that [statements on legal issues] seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a *lack of fitness for office*." *Post*, at 2547 [155a] (emphasis added). Of course *all* statements on real-world legal issues "indicate" how the speaker would rule "in specific cases." And if making such statements (*of honestly held views*) with the hope of enhancing one's chances with the electorate displayed a lack of fitness for office, so would similarly motivated honest statements of judicial candidates made with the hope of enhancing their chances of confirmation by the Senate, or indeed of appointment by the President. Since such statements are made, we think, in every confirmation hearing, Justice STEVENS must contemplate a federal bench filled with the unfit.

U.S., at 222-223, 109 S.Ct. 1013 (internal quotation marks omitted). "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395, 82 S.Ct. 1364, 8 L. Ed. 2d 569 (1962). "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Brown*, 456 U.S., at 60, 102 S.Ct. 1523 (internal quotation marks omitted). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Justice GINSBURG would do so—and much of her dissent confirms rather than refutes our conclusion that the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections. She contends that the announce clause must be constitutional because due process would be denied if an elected judge sat in a case involving an issue on which he had previously announced his view. *Post*, at 2556-2557, 2558 [174a-175a, 177a]. She reaches this conclusion because, she says, such a judge would have a "direct, personal, substantial, and pecuniary interest" in ruling consistently with his previously announced view, in order to reduce the risk that he will be "voted off the bench and thereby lose [his] salary and emoluments," *post*, at 2556 [174a] (internal quotation marks and alterations omitted). But elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue. So if, as Justice GINSBURG claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. It is not difficult to understand how one with these views would approve the election-nullifying effect of the announce clause.[9] They are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted, see *infra*, at 2540 [141a].

Justice GINSBURG devotes the rest of her dissent to attacking arguments we do not make. For example, despite the number of pages she dedicates to disproving this proposition, *post*, at 2550-2552 [162a-166a], we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.[10] What we do assert, and what Justice GINSBURG ignores, is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms. We rely on the cases involving speech during elections, *supra*, at 2538 [186a-188a], only to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.[11]

---

[9] Justice GINSBURG argues that the announce clause is not election nullifying because Wersal criticized past decisions of the Minnesota Supreme Court in his campaign literature and the Lawyers Board decided not to discipline him for doing so. *Post*, at 2554 [168a]. As we have explained, however, had Wersal additionally stated during his campaign that he did not feel bound to follow those erroneous decisions, he would not have been so lucky. *Supra*, at 2533-2534 [128a-129a]. This predicament hardly reflects "the robust communication of ideas and views from judicial candidate to voter." *Post*, at 2554 [170a].

[10] Justice STEVENS devotes most of his dissent to this same argument that we do not make.

But in any case, Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench." *Post*, at 2551 [164a]. This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well. See, *e.g., Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999). Which is precisely why the election of state judges became popular.[12]

---

[11] Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues. Thus, Justice GINSBURG's repeated invocation of instances in which nominees to this Court declined to announce such views during Senate confirmation hearings is pointless. *Post*, at 2552 [165a], n. 1, 2558 [177a], n. 4. That the practice of *voluntarily* demurring does not establish the legitimacy of *legal compulsion* to demur is amply demonstrated by the unredacted text of the sentence she quotes in part, *post*, at 2558 [177a], from *Laird v. Tatum*, 409 U.S. 824, 836, n. 5, 93 S.Ct. 7, 34 L. Ed. 2d 50 (1972): "*In terms of propriety, rather than disqualification,* I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench." (Emphasis added.)

[12] Although Justice STEVENS at times appears to agree with Justice GINSBURG's premise that the judiciary is completely separated from the enterprise of representative government, *post*, at 2547 [155a] ("[E]very good judge is fully aware of the distinction

IV

To sustain the announce clause, the Eighth Circuit relied heavily on the fact that a pervasive practice of prohibiting judicial candidates from discussing disputed legal and political issues developed during the last half of the 20th century. 247 F.3d, at 879-880. It is true that a "universal and long-established" tradition of prohibiting certain conduct creates "a strong presumption" that the prohibition is constitutional: "Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375-377, 115 S.Ct. 1511, 131 L. Ed. 2d 426 (1995) (SCALIA, J., dissenting). The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal.

---

between the law and a personal point of view"), he eventually appears to concede that the separation does not hold true for many judges who sit on courts of last resort, *ibid.* ("If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls"); *post*, at 2547 [156a], n. 2. Even if the policymaking capacity of judges were limited to courts of last resort, that would only prove that the announce clause fails strict scrutiny. "[I]f announcing one's views in the context of a campaign for the State Supreme Court might be" protected speech, ibid., then—even if announcing one's views in the context of a campaign for a lower court were *not* protected speech, *ibid.*—the announce clause would not be narrowly tailored, since it applies to high-and low-court candidates alike. In fact, however, the judges of inferior courts *often* "make law," since the precedent of the highest court does not cover every situation, and not every case is reviewed. Justice STEVENS has repeatedly expressed the view that a settled course of lower court opinions binds the highest court. See, *e.g.*, *Reves v. Ernst & Young*, 494 U.S. 56, 74, 110 S.Ct. 945, 108 L. Ed. 2d 47 (1990) (concurring opinion); *McNally v. United States*, 483 U.S. 350, 376-377, 107 S.Ct. 2875, 97 L. Ed. 2d 292 (1987) (dissenting opinion).

At the time of the founding, only Vermont (before it became a State) selected any of its judges by election. Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy. By the time of the Civil War, the great majority of States elected their judges. E. Haynes, Selection and Tenure of Judges 99-135 (1944); Berkson, Judicial Selection in the United States: A Special Report, 64 Judicature 176 (1980). We know of no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century. Indeed, judicial elections were generally partisan during this period, the movement toward nonpartisan judicial elections not even beginning until the 1870's. *Id.*, at 176-177; M. Comisky & P. Patterson, The Judiciary—Selection, Compensation, Ethics, and Discipline 4, 7 (1987). Thus, not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while.

The first code regulating judicial conduct was adopted by the ABA in 1924. 48 ABA Reports 74 (1923) (report of Chief Justice Taft); P. McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns 86 (1990). It contained a provision akin to the announce clause: "A candidate for judicial position . . . should not announce in advance his conclusions of law on disputed issues to secure class support . . . ." ABA Canon of Judicial Ethics 30 (1924). The States were slow to adopt the canons, however. "By the end of World War II, the canons . . . were binding by the bar associations or supreme courts of only eleven states." J. MacKenzie, The Appearance of Justice 191 (1974). Even today, although a majority of States have adopted either the announce clause or its 1990 ABA successor, adoption is not unanimous. Of the 31 States that select some or all of their appellate and general-jurisdiction judges by election, see

American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr. 2002), 4 have adopted no candidate-speech restriction comparable to the announce clause,[13] and 1 prohibits only the discussion of "pending litigation."[14] This practice, relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases. *E.g., Burson v. Freeman*, 504 U.S. 191, 205-206, 112 S.Ct. 1846, 119 L. Ed. 2d 5 (1992) (crediting tradition of prohibiting speech around polling places that began with the very adoption of the secret ballot in the late 19th century, and in which every State participated); *id.*, at 214-216, 112 S.Ct. 1846 (SCALIA, J., concurring in judgment) (same); *McIntyre, supra*, at 375-377, 115 S.Ct. 1511 (SCALIA, J., dissenting) (crediting tradition of prohibiting anonymous election literature, which again began in 1890 and was universally adopted).

* * *

There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits. (The candidate-speech restrictions of all the other States that have them are also the product of judicial fiat.[15]) The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. See ABA Model Code of Judicial Conduct, Canon 5(C)(2), Comment (2000) ("[M]erit selection of judges is a preferable manner in which to select the judiciary"); An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence 96 (1997) ("The American Bar Association strongly endorses the merit selection of judges, as opposed to their election .... Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected ... to work for the adoption of merit selection and retention"). That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles." *Renne v. Geary*, 501 U.S. 312, 349, 111 S.Ct. 2331, 115 L. Ed. 2d 288 (1991) (Marshall, J., dissenting); accord, *Meyer v. Grant*, 486 U.S. 414, 424-425, 108 S.Ct. 1886, 100 L. Ed. 2d 425 (1988) (rejecting argument that the greater power to end voter initiatives includes the lesser power to prohibit paid petition-circulators).

---

[13] Idaho Code of Judicial Conduct, Canon 7 (2001); Mich. Code of Judicial Conduct, Canon 7 (2002); N.C. Code of Judicial Conduct, Canon 7 (2001); Ore. Code of Judicial Conduct, Rule 4-102 (2002). All of these States save Idaho have adopted the pledges or promises clause.

[14] Ala. Canon of Judicial Ethics 7(B)(1)(c) (2002).

[15] These restrictions are all contained in these States' codes of judicial conduct, App. to Brief for ABA as *Amicus Curiae*. "In every state, the highest court promulgates the Code of Judicial Conduct, either by express constitutional provision, statutory authorization, broad constitutional grant, or inherent power." In the Supreme

---

Court of Texas: Per Curiam Opinion Concerning Amendments to Canons 5 and 6 of the Code of Judicial Conduct, 61 Tex. B.J. 64, 66 (1998) (collecting provisions).

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. Respondents claim that "[t]he Announce Clause is necessary . . . to protect the State's compelling governmental interes[t] in an actual and perceived . . . impartial judiciary." Brief for Respondents 8. I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is "'like ignoring a crocodile in your bathtub'"); Bright & Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U.L. Rev. 759, 793-794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. See Schotland, Financing Judicial Elections, 2000: Change and Challenge, 2001 L. Rev. Mich. State U. Detroit College of Law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for 5 seats on the Alabama Supreme Court spent an average of $1,092,076 on their campaigns); American Bar Association, Report and Recommendations of the Task Force on Lawyers' Political Contributions, pt. 2 (July 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme Court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court). Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. See Thomas, National L. J., Mar. 16, 1998, p. A8, col. 1 (reporting that a study by the public interest group Texans for Public Justice found that 40 percent of the $9,200,000 in contributions of $100 or more raised by seven of Texas' nine Supreme Court justices for their 1994 and 1996 elections "came from parties and lawyers with cases before the court or contributors closely linked to these parties"). Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary. See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001) (available at http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf) (describing survey results indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment); Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 Cath. U. L. Rev. 361, 379 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court).

Despite these significant problems, 39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both. American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr. 2002). Judicial elections were not always so prevalent. The first 29 States of the Union adopted methods for selecting judges that did not involve popular elections. See Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 716 (1995). As the Court explains, however, beginning with Georgia in 1812, States began adopting systems for judicial elections. See *ante*, at 2540 [142a]. From the 1830's until the 1850's, as part of the Jacksonian movement toward greater popular control of public office, this trend accelerated, see Goldschmidt, Merit Selection: Current Status, Procedures, and Issues, 49 U. Miami L. Rev. 1, 5 (1994), and by the Civil War, 22 of the 34 States elected their judges, *ibid.* By the beginning of the 20th century, however, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted. Croley, *supra*, at 723. In 1906, Roscoe Pound gave a speech to the American Bar Association in which he claimed that "compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." The Causes of Popular Dissatisfaction with the Administration of Justice, 8 Baylor L. Rev. 1, 23 (1956) (reprinting Pound's speech).

In response to such concerns, some States adopted a modified system of judicial selection that became known as the Missouri Plan (because Missouri was the first State to adopt it for most of its judicial posts). See Croley, 62 U. Chi. L. Rev., at 724. Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. *Ibid.* If a judge is recalled, the vacancy is filled through a new nomination and appointment. *Ibid.* This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges. See Grodin, Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections, 61 S. Cal. L. Rev. 1969, 1980 (1988) (admitting that he cannot be sure that his votes as a California Supreme Court Justice in "critical cases" during 1986 were not influenced subconsciously by his awareness that the outcomes could affect his chances in the retention elections being conducted that year). The Missouri Plan is currently used to fill at least some judicial offices in 15 States. Croley, *supra*, at 725-726; American Judicature Society, *supra*.

Thirty-one States, however, still use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who thereafter run for reelection periodically. *Ibid.* Of these, slightly more than half use nonpartisan elections, and the rest use partisan elections.

Ibid. Most of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation. See Croley, *supra*, at 725.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

Justice KENNEDY, concurring.

I agree with the Court that Minnesota's prohibition on judicial candidates' announcing their legal views is an unconstitutional abridgment of the freedom of speech. There is authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases, see, *e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L. Ed. 2d 476 (1991), and the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test. So I join its opinion.

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." *Id.*, at 124, 112 S.Ct. 501 (KENNEDY, J., concurring in judgment). The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. Nothing in the Court's opinion should be read to cast doubt on the vital importance of this state interest. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Articulated standards of judicial conduct may advance this interest. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059 (1996). To comprehend, then to codify, the essence of judicial integrity is a hard task, however. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921). Much the same can be said of explicit standards to ensure judicial integrity. To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service. See, *e.g.*, Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges (1999). Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State. See *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S.Ct. 1523, 71 L. Ed. 2d 732 (1982). The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech. See Sedition Act of 1798, ch. 74, 1 Stat. 596. Cooler heads have always recognized, however, that these measures abridge the freedom of speech—not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are "'expressly and positively forbidden by'" the

First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 274, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964) (quoting the Virginia Resolutions of 1798). The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal Judiciary. In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor." *Bridges v. California*, 314 U.S. 252, 273, 62 S.Ct. 190, 86 L. Ed. 192 (1941).

These considerations serve but to reinforce the conclusion that Minnesota's regulatory scheme is flawed. By abridging speech based on its content, Minnesota impeaches its own system of free and open elections. The State may not regulate the content of candidate speech merely because the speakers are candidates. This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L. Ed. 2d 811 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.

Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner. Even the undoubted interest of the State in the excellence of its judiciary does not allow it to restrain candidate speech by reason of its content. Minnesota's attempt to regulate campaign speech is impermissible.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

In her dissenting opinion, Justice GINSBURG has cogently explained why the Court's holding is unsound. I therefore join her opinion without reservation. I add these comments to emphasize the force of her arguments and to explain why I find the Court's reasoning even more troubling than its holding. The limits of the Court's holding are evident: Even if the Minnesota Lawyers Professional Responsibility Board (Board) may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. If the solution to harmful speech must be more speech, so be it. The Court's reasoning, however, will unfortunately endure beyond the next election cycle. By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.

The Court's disposition rests on two seriously flawed premises—an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom "'to express themselves on matters of current public importance'" as do all other elected officials. *Ante*, at 2538 [138a]. Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. Sir Matthew Hale pointedly described this essential attribute of the judicial office in words which have retained their integrity for centuries:

> "'11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.
>
> "'12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.'"[1]

Consistent with that fundamental attribute of the office, countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections. For this reason, opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the distinction between the law and a personal point of view. It is equally clear, however, that such expressions after a lawyer has been nominated to judicial office shed little, if any, light on his capacity for judicial service. Indeed, to the extent that such statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for the office.

Of course, any judge who faces reelection may believe that he retains his office only so long as his decisions are popular. Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls.[2] He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.

---

[1] 2 J. Campbell, Lives of the Chief Justices of England 208 (1873) (quoting Hale's Rules For His Judicial Guidance, Things Necessary to be Continually Had in Remembrance).

By recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary, we do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes. As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency. In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office. But we do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly." Once elected, he may feel free to disregard his campaign statements, *ante*, at 2537-2538 [136a-137a], but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him*. Minnesota has a compelling interest in sanctioning such statements.

---

[2] The Court largely ignores the fact that judicial elections are not limited to races for the highest court in the State. Even if announcing one's views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship. Such statements not only display a misunderstanding of the judicial role, but also mislead the voters by giving them the false impression that a candidate for the trial court will be able to and should decide cases based on his personal views rather than precedent.

Indeed, the Court's entire analysis has a hypothetical quality to it that stems, in part, from the fact that no candidate has yet been sanctioned for violating the announce clause. The one complaint filed against petitioner Gregory Wersal for campaign materials during his 1996 election run was dismissed by the Board. App. 16-21. Moreover, when Wersal sought an advisory opinion during his 1998 campaign, the Board could not evaluate his request because he had "not specified what statement [he] would make that may or may not be a view on a disputed, legal or political issue." *Id.*, at 32. Since Wersal failed to provide examples of statements he wished to make, and because the Board had its own doubts about the constitutionality of the announce clause, it advised Wersal that "unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable." *Ibid.* Consequently, the Court is left to decide a question of great constitutional importance in a case in which either the petitioner's statements were not subject to the prohibition in question, or he neglected to supply any concrete examples of statements he wished to make, and the Board refused to enforce the prohibition because of its own constitutional concerns.

A candidate for judicial office who goes beyond the expression of "general observation about the law... in order to obtain favorable consideration" of his candidacy, *Laird v. Tatum*, 409 U.S. 824, 836, n. 5, 93 S.Ct. 7, 34 L. Ed. 2d 50 (1972) (memorandum of REHNQUIST, J., on motion for recusal), demonstrates either a lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary. It is only by failing to recognize the distinction, clearly stated by then-Justice REHNQUIST, between statements made during a campaign or confirmation hearing and those made before announcing one's candidacy, that the Court is able to conclude: "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either," *ante*, at 2536 [133a].

Even when "impartiality" is defined in its narrowest sense to embrace only "the lack of bias for or against either *party* to the proceeding," *ante*, at 2535 [131a], the announce clause serves that interest. Expressions that stress a candidate's unbroken record of affirming convictions for rape,[3] for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases). Contrary to the Court's reasoning in its first attempt to define impartiality, *ante*, at 2535 [131a], an interpretation of the announce clause that prohibits such statements serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality.

When the Court evaluates the importance of impartiality in its broadest sense, which it describes as "the interest in openmindedness, or at least in the appearance of, open-mindedness" *ante*, at 2536 [134a], it concludes that the announce clause is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous," *ante*, at 2537 [136a]. It is underinclusive, in the Court's view, because campaign statements are an infinitesimal portion of the public commitments to legal positions that candidates make during their professional careers. It is not, however, the number of legal views that a candidate may have formed or discussed in his prior career that is significant. Rather, it is the ability both to reevaluate them in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial open-mindedness.

The Court boldly asserts that respondents have failed to carry their burden of demonstrating "that campaign statements are uniquely destructive of open-mindedness," *ante*, at 2538 [137a]. But the very purpose of most statements prohibited by the announce clause is to convey the message that the candidate's mind is not open on a particular issue.

---

[3] See *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 226 (C.A. 7 1993).

The lawyer who writes an article advocating harsher penalties for polluters surely does not commit to that position to the same degree as the candidate who says "vote for me because I believe all polluters deserve harsher penalties." At the very least, such statements obscure the appearance of open-mindedness. More importantly, like the reasoning in the Court's opinion, they create the false impression that the standards for the election of political candidates apply equally to candidates for judicial office.[1]

The Court seems to have forgotten its prior evaluation of the importance of maintaining public confidence in the "disinterestedness" of the judiciary. Commenting on the danger that participation by judges in a political assignment might erode that public confidence, we wrote: "While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L. Ed. 2d 714 (1989).

---

[1] Justice KENNEDY would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment. *Ante*, at 2544 [149a-150a] (concurring opinion). While he does not say so explicitly, this extreme position would preclude even Minnesota's prohibition against "pledges or promises" by a candidate for judicial office. Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). A candidate could say "vote for me because I promise to never reverse a rape conviction," and the Board could do nothing to formally sanction that candidate. The unwisdom of this proposal illustrates why the same standards should not apply to speech in campaigns for judicial and legislative office.

Conversely, the judicial reputation for impartiality and open-mindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office. As an elected judge recently noted:

> "Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have 'political constituencies.' Rather, a judge's fidelity must be to enforcement of the rule of law regardless of perceived popular will." De Muniz, Politicizing State Judicial Elections: A Threat to Judicial Independence, 38 Willamette L. Rev. 367, 387 (2002).

The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided. I therefore respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judge[s] represen[t] the Law." *Chisom v. Roemer*, 501 U.S. 380, 411, 111 S.Ct. 2354, 115 L. Ed. 2d 348 (1991) (SCALIA, J., dissenting). Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266, 115 S.Ct. 1447, 131 L. Ed. 2d 328 (1995) (STEVENS, J., dissenting), neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will," Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1180 (1989).

A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," *United States v. Will*, 449 U.S. 200, 217, 101 S.Ct. 471, 66 L. Ed. 2d 392 (1980), an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L. Ed. 1628 (1943). "Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, 466 (C. Rossiter ed. 1961).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota has designated all judicial elections nonpartisan. *See Peterson v. Stafford*, 490 N.W.2d 418, 425 (Minn. 1992). And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-882 (C.A.8 2001).

The question this case presents is whether the First Amendment stops Minnesota from furthering its interest in judicial integrity through this precisely targeted speech restriction.

I

The speech restriction must fail, in the Court's view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say. See *ante*, at 2538 [137a] (notion that "right to speak out on disputed issues" may be abridged in an election context "sets our First Amendment jurisprudence on its head"); *ante*, at 2541 [144a] (power to dispense with elections does not include power to curtail candidate speech if State leaves election process in place); 247 F.3d, at 897 (Beam, J., dissenting) ("[W]hen a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association."); *id.*, at 903 (same).

I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections; they are "at the core of our electoral process," *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 21 L. Ed. 2d 24 (1968), for they "enhance the accountability of government officials to the people whom they represent," *Brown v. Hartlage*, 456 U.S. 45, 55, 102 S.Ct. 1523, 71 L. Ed. 2d 732 (1982).

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. "[I]t is the business of judges to be indifferent to popularity." *Chisom*, 501 U.S., at 401, n. 29, 111 S.Ct. 2354 (internal quotation marks omitted). They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. Rehnquist, Dedicatory Address: Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229-300 (1980). Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public. See *Barnette*, 319 U.S., at 638, 63 S.Ct. 1178 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench. As to persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place. *E.g., ante*, at 2538 [138a] (quoting *Wood v. Georgia*, 370 U.S. 375, 395, 82 S.Ct. 1364, 8 L. Ed. 2d 569 (1962) ("*The role that elected officials play in our society* makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." (Emphasis added.))). See O'Neil, The Canons in the Courts: Recent First Amendment Rulings, 35 Ind. L. Rev. 701, 717 (2002) (reliance on cases involving nonjudicial campaigns, particularly *Brown v. Hartlage*, is "grievously misplaced"; "[h]ow any thoughtful judge could derive from that ruling any possible guidance for cases that involve judicial campaign speech seems baffling"). In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office. See *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (C.A.7 1993) ("Mode of appointment is only one factor that enables distinctions to be made among different kinds of public official. Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

The Court sees in this conclusion, and in the Announce Clause that embraces it, "an obvious tension," *ante*, at 2541 [143a]: The Minnesota electorate is permitted to select its judges by popular vote, but is not provided information on "subjects of interest to the voters," *ibid.*—in particular, the voters are not told how the candidate would decide controversial cases or issues if elected. This supposed tension, however, rests on the false premise that by departing from the federal model with respect to who chooses judges, Minnesota necessarily departed from the federal position on the criteria relevant to the exercise of that choice.[1]

The Minnesota Supreme Court thought otherwise:

> "The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is

---

[1] In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be "of interest" to the President and the Senate in the exercise of their respective nomination and confirmation powers, just as information of that type would "interest" a Minnesota voter. But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well. See Brief for Respondents 17-42 (collecting statements at Senate confirmation hearings). Surely the Court perceives no tension here; the line each of us drew in response to preconfirmation questioning, the Court would no doubt agree, is crucial to the health of the Federal Judiciary. But by the Court's reasoning, the reticence of prospective and current federal judicial nominees dishonors Article II, for it deprives the President and the Senate of information that might aid or advance the decision to nominate or confirm. The point is not, of course, that this "practice of voluntarily demurring" by itself "establish[es] the legitimacy of legal compulsion to demur," *ante*, at 2539 [140a], n. 11 (emphasis deleted). The federal norm simply illustrates that, contrary to the Court's suggestion, there is nothing inherently incongruous in depriving those charged with choosing judges of certain information they might desire during the selection process.

> the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson*, 490 N.W.2d, at 420.

Nothing in the Court's opinion convincingly explains why Minnesota may not pursue that goal in the manner it did.

Minnesota did not choose a judicial selection system with all the trappings of legislative and executive races. While providing for public participation, it tailored judicial selection to fit the character of third branch office holding. See *id.*, at 425 (Minnesota's system "keep[s] the ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function."). The balance the State sought to achieve—allowing the people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised—should encounter no First Amendment shoal. See generally O'Neil, *supra*, at 715-723.

II

Proper resolution of this case requires correction of the Court's distorted construction of the provision before us for review. According to the Court, the Announce Clause "prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*." *Ante*, at 2534 [129a]. In two key respects, that construction misrepresents the meaning of the Announce Clause as interpreted by the Eighth Circuit and embraced by the Minnesota Supreme Court, *In re Code of Judicial Conduct*, 639 N.W.2d 55 (Minn. 2002), which has the final word on this matter, see *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308, 49 L. Ed. 2d 1 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State.").

First and most important, the Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions, *ante*, at 2534 [129a]; it prevents her from "publicly making known how [she] would *decide*" disputed issues, 247 F.3d, at 881-882 (emphasis added). That limitation places beyond the scope of the Announce Clause a wide range of comments that may be highly informative to voters. Consistent with the Eighth Circuit's construction, such comments may include, for example, statements of historical fact ("As a prosecutor, I obtained 15 drunk driving convictions"); qualified statements ("Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers"); and statements framed at a sufficient level of generality ("Drunk drivers are a threat to the safety of every driver"). What remains within the Announce Clause is the category of statements that essentially commit the candidate to a position on a specific issue, such as "I think all drunk drivers should receive the maximum sentence permitted by law." See Tr. of Oral Arg. 45 (candidate may not say "'I'm going to decide this particular issue this way in the future'").

Second, the Court misportrays the scope of the Clause as applied to a candidate's discussion of past decisions. Citing an apparent concession by respondents at argument, *id.*, at 33-34, the Court concludes that "statements critical of past judicial decisions are not permissible if the candidate also states that he is against *stare decisis*," *ante*, at 2533 [127a] (emphasis deleted). That conclusion, however, draws no force from the meaning attributed to the Announce Clause by the Eighth Circuit. In line with the Minnesota Board on Judicial Standards, the Court of Appeals stated without qualification that the Clause "does not prohibit candidates from discussing appellate court decisions." 247 F.3d, at 882 (citing Minn. Bd. on Judicial Standards, Informal Opinion, Oct. 10, 1990, App. 55 ("In all election contests, a candidate for judicial office may discuss decisions and opinions of the Appellate courts.")). The Eighth Circuit's controlling construction should not be modified by respondents' on the spot answers to fast-paced hypothetical questions at oral argument. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170, 92 S.Ct. 1965, 32 L. Ed. 2d 627 (1972) ("We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument.").

The Announce Clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges. Judicial candidates in Minnesota may not only convey general information about themselves, see *ante*, at 2534 [129a-130a], they may also describe their conception of the role of a judge and their views on a wide range of subjects of interest to the voters. See App. 97-103; Brief for Minnesota State Bar Association as *Amicus Curiae* 22-23 (*e.g.*, the criteria for deciding whether to depart from sentencing guidelines, the remedies for racial and gender bias, and the balance between "free speech rights [and] the need to control [hate crimes]" (internal quotation marks omitted)). Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do—simply or with sophistication—is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, as to an appellate bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

The Court's characterization of the Announce Clause as "election-nullifying," *ante*, at 2539 [139a], "plac[ing] most subjects of interest to the voters off limits," *ante*, at 2541 [143a], is further belied by the facts of this case. In his 1996 bid for office, petitioner Gregory Wersal distributed literature sharply criticizing three Minnesota Supreme Court decisions. Of the court's holding in the first case—that certain unrecorded confessions must be suppressed—Wersal asked, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" App. 37. Of the second case, invalidating a state welfare law, Wersal stated: "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies." *Ibid.* And of the third case, a decision involving abortion rights, Wersal charged that the court's holding was "directly contrary to the opinion of the U.S. Supreme Court," "unprecedented," and a "pro-abortion stance." *Id.*, at 38.

When a complaint was filed against Wersal on the basis of those statements, *id.*, at 12-15, the Lawyers Professional Responsibility Board concluded that no discipline was warranted, in part because it thought the disputed campaign materials did not violate the Announce Clause, *id.*, at 20-21. And when, at the outset of his 1998 campaign, Wersal sought to avoid the possibility of sanction for future statements, he pursued the option, available to all Minnesota judicial candidates, Tr. of Oral Arg. 12-13, of requesting an advisory opinion concerning the application of the Announce Clause. App. 24-26. In response to that request, the Board indicated that it did not anticipate any adverse action against him. *Id.*, at 31-33.[2] Wersal has thus never been sanctioned under the Announce Clause for any campaign statement he made. On the facts before us, in sum, the Announce Clause has hardly stifled the robust communication of ideas and views from judicial candidate to voter.

---

[2] In deciding not to sanction Wersal for his campaign statements, and again in responding to his inquiry about the application of the Announce Clause, the Board expressed "doubts about the constitutionality of the current Minnesota Canon." App. 20; *id.*, at 32. Those doubts, however, concerned the meaning of the Announce

III

Even as it exaggerates the reach of the Announce Clause, the Court ignores the significance of that provision to the integrated system of judicial campaign regulation Minnesota has developed. Coupled with the Announce Clause in Minnesota's Code of Judicial Conduct is a provision that prohibits candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). Although the Court is correct that this "pledges or promises" provision is not directly at issue in this case, see *ante*, at 2532, the Court errs in overlooking the interdependence of that prohibition and the one before us. In my view, the constitutionality of the Announce Clause cannot be resolved without an examination of that interaction in light of the interests the pledges or promises provision serves.

A

All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results. See Brief for Petitioners Republican Party of Minnesota et al. 36-37; Tr. of Oral Arg. 14-16 (petitioners' acknowledgment that candidates may be barred from making a "pledge or promise of an outcome"); Brief for Respondents 11; see also Brief for Brennan Center for Justice et al. as *Amici Curiae* 23 ("All of the parties and

---

Clause before the Eighth Circuit applied, and the Minnesota Supreme Court adopted, the limiting constructions that now define that provision's scope.

amici in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner.").

The reasons for this agreement are apparent. Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent "with the judge's obligation to decide cases in accordance with his or her role." Tr. of Oral Arg. 16; see Brief for Petitioners Republican Party of Minnesota et al. 36 ("[B]ecause [judges] have a duty to decide a case on the basis of the law and facts before them, they can be prohibited, as candidates, from making such promises."). This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980). The proscription against pledges or promises thus represents an accommodation of "constitutionally protected interests [that] lie on both sides of the legal equation." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400, 120 S.Ct. 897, 145 L. Ed. 2d 886 (2000) (BREYER, J., concurring). Balanced against the candidate's interest in free expression is the litigant's "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall*, 446 U.S., at 243, 100 S.Ct. 1610; *see Buckley*, 997 F.2d, at 227 ("Two principles are in conflict and must, to the extent possible, be reconciled. . . . The roots of both principles lie deep in our constitutional heritage.").

The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L. Ed. 942 (1955). Our cases have "jealously guarded" that basic concept, for it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 446 U. S, at 242, 100 S.Ct. 1610.

Applying this principle in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749 (1927), we held that due process was violated where a judge received a portion of the fines collected from defendants whom he found guilty. Such an arrangement, we said, gave the judge a "direct, personal, substantial[, and] pecuniary interest" in reaching a particular outcome and thereby denied the defendant his right to an impartial arbiter. *Id.*, at 523, 47 S.Ct. 437. *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972), extended *Tumey's* reasoning, holding that due process was similarly violated where fines collected from guilty defendants constituted a large part of a village's finances, for which the judge, who also served as the village mayor, was responsible. Even though the mayor did not personally share in those fines, we concluded, he "perforce occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial." 409 U.S., at 60, 93 S.Ct. 80 (internal quotation marks omitted).

We applied the principle of *Tumey* and *Ward* most recently in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L. Ed. 2d 823 (1986). That decision invalidated a ruling of the Alabama Supreme Court written by a justice who had a personal interest in the resolution of a dispositive issue. The Alabama Supreme Court's ruling was issued while the justice was pursuing a separate lawsuit in an Alabama lower court, and its outcome "had the clear and immediate effect of enhancing both the legal status and the settlement value" of that separate suit. *Id.*, at 824, 106 S.Ct. 1580. As in *Ward* and *Tumey*, we held, the justice therefore had an interest in the outcome of the decision that unsuited him to participate in the judgment. 475 U.S., at 824, 106 S.Ct. 1580. It mattered not whether the justice was actually influenced by this interest; "[t]he Due Process Clause," we observed, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.*, at 825, 106 S.Ct. 1580 (internal quotation marks omitted).

These cases establish three propositions important to this dispute. First, a litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in ruling against him. *Id.*, at 824, 106 S.Ct. 1580 (internal quotation marks and alteration omitted). Second, this interest need not be as direct as it was in *Tumey*, where the judge was essentially compensated for each conviction he obtained; the interest may stem, as in *Ward*, from the judge's knowledge that his success and tenure in office depend on certain outcomes. "[T]he test," we have said, "is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S., at 60, 93 S.Ct. 80 (quoting *Tumey*, 273 U.S., at 532, 47 S.Ct. 437). And third, due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, our cases have "always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S., at 136, 75 S.Ct. 623. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S., at 532, 47 S.Ct. 437.[3]

---

[3] To avoid the import of our due process decisions, the Court dissects the concept of judicial "impartiality," *ante*, at 2535-2537 [131a-136a], concluding that only one variant of that concept—lack of prejudice against a *party*—is secured by the Fourteenth Amendment, *ante*, at 2535-2536 [131a-132a]. Our Due Process Clause cases do not focus solely on bias against a particular party, but rather

The justification for the pledges or promises prohibition follows from these principles. When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views; she will also "ris[k] being assailed as a dissembler," 247 F.3d, at 878, willing to say one thing to win an election and to do the opposite once in office.

A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, *Tumey*, 273 U.S., at 523, 47 S.Ct. 437, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059, 1083-1092 (1996); see *id.*, at 1088 ("[A]

---

inquire more broadly into whether the surrounding circumstances and incentives compromise the judge's ability faithfully to discharge her assigned duties. See *supra*, at 2556 [173a]. To be sure, due process violations may arise where a judge has been so personally "enmeshed in matters" concerning one party that he is biased against him. See *Johnson v. Mississippi*, 403 U.S. 212, 215, 91 S.Ct. 1778, 29 L. Ed. 2d 423 (1971) (*per curiam*) (judge had been "a defendant in one of petitioner's civil rights suits and a losing party at that"). They may also arise, however, not because of any predisposition toward a party, but rather because of the judge's personal interest in resolving an issue a certain way. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L. Ed. 2d 823 (1986). Due process will not countenance the latter situation, even though the self-interested judge "will apply the law to [the losing party] in the same way he [would apply] it to any other party" advancing the same position, *ante*, at 2535 [131a].

campaign promise [may be characterized as] a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge."); see also The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) ("In the general course of human nature, a power over a man's subsistence amounts to a power over his will." (emphasis deleted)).

Given this grave danger to litigants from judicial campaign promises, States are justified in barring expression of such commitments, for they typify the "situatio[n] . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L. Ed. 2d 712 (1975). By removing this source of "possible temptation" for a judge to rule on the basis of self-interest, *Tumey*, 273 U.S., at 532, 47 S.Ct. 437, the pledges or promises prohibition furthers the State's "compellin[g] interest in maintaining a judiciary fully capable of performing" its appointed task, *Gregory v. Ashcroft*, 501 U.S. 452, 472, 111 S.Ct. 2395, 115 L. Ed. 2d 410 (1991): "judging [each] particular controversy fairly on the basis of its own circumstances," *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 85 L. Ed. 1429 (1941). See O'Neil, 35 Ind. L. Rev., at 723 ("What is at stake here is no less than the promise of fairness, impartiality, and ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.").

In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary. See Tr. of Oral Arg. 16 (petitioners' statement that pledges or promises properly fosters "public perception of the impartiality of the judiciary"). See *Cox v.*

Louisiana, 379 U.S. 559, 565, 85 S.Ct. 476, 13 L. Ed. 2d 487 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); *In re Murchison*, 349 U.S., at 136, 75 S.Ct. 623 ("[T]o perform its high function in the best way[,] 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L. Ed. 11 (1954))). Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. See *Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L. Ed. 2d 714 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). As the Minnesota Supreme Court has recognized, all legal systems—regardless of their method of judicial selection—"can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (1984).

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo*—a judicial candidate's promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.[1] Then-Justice REHNQUIST's observations about the federal system apply with equal if not greater force in the context of Minnesota's elective judiciary: Regarding the appearance of judicial integrity,

> "[one must] distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird v. Tatum*, 409 U.S. 824, 836, n. 5, 93 S.Ct. 7, 34 L. Ed. 2d 50 (1972) (memorandum opinion).

B

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

---

[1] The author of the Court's opinion declined on precisely these grounds to tell the Senate whether he would overrule a particular case:

> "Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." 13 R. Mersky & J. Jacobstein, The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1986, p. 131 (1989) (hearings before the Senate Judiciary Committee on the nomination of then-Judge Scalia).

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate who campaigns by saying, "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages," *ante*, at 2537 [136a], will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: "I think it is constitutional for the legislature to prohibit same-sex marriages," *ibid.* Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." *Ante*, at 2532 [126a]. And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one. See *ante*, at 2537-2538 [136a-137a] (emphasis deleted).

By targeting statements that do not technically constitute pledges or promises but nevertheless "publicly mak[e] known how [the candidate] would decide" legal issues, 247 F.3d, at 881-882, the Announce Clause prevents this end run around the letter and spirit of its companion provision.[5] No less than the pledges or promises clause itself, the Announce Clause is an indispensable part of Minnesota's effort to maintain the health of its judiciary, and is therefore constitutional for the same reasons.

* * *

This Court has recognized in the past, as Justice O'CONNOR does today, see *ante*, at 2542-2543 [146a-147a] (concurring opinion), a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom*, 501 U.S., at 400, 111 S.Ct. 2354. We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States that wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

---

[5] In the absence of the Announce Clause, other components of the Minnesota Code of Judicial Conduct designed to maintain the nonpartisan character of the State's judicial elections would similarly unravel. A candidate would have no need to "attend political gatherings" or "make speeches on behalf of a political organization," Minn. Code of Judical Conduct, Canon 5(A)(1)(c), (d) (2002), for she could simply state her views elsewhere, counting on her supporters to carry those views to the party faithful. And although candidates would remain barred from "seek [ing], accept[ing,] or us[ing] endorsements from a political organization," Canon 5(A)(1)(d), parties might well provide such endorsements unsolicited upon hearing candidates' views on specific issues. Cf. *ante*, at 2532 (Minnesota Republican Party sought to learn Wersal's views so party could support or oppose his candidacy). Those unsolicited endorsements, in turn, would render ineffective the prohibition against candidates "identify[ing] themselves as members of a political organization," Canon 5(A)(1)(a). "Indeed, it is not too much to say that the entire fabric of Minnesota's non[p]artisan elections hangs by the Announce clause thread." Brief for Minnesota State Bar Association as *Amicus Curiae* 20.

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. P. McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns 86 (1990); Brief for the Conference of Chief Justices as *Amicus Curiae* 5. The Announce Clause, borne of this long effort, "comes to this Court bearing a weighty title of respect," *Teamsters v. Hanke*, 339 U.S. 470, 475, 70 S.Ct. 773, 94 L. Ed. 995 (1950). I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area. Accordingly, I would affirm the judgment of the Court of Appeals for the Eighth Circuit.

APPENDIX E

UNITED STATES SUPREME COURT

REPUBLICAN PARTY OF MINNESOTA, ET AL.
PETITIONERS,

V.

VERNA KELLY, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANADARDS, ET AL.

No. 01-521

Dec. 3, 2001

Case below, 247 F.3d 854.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to Question 1 presented by the petition.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, ET AL.,
APPELLANTS,

v.

BARRY M. LAZARUS, ET AL.,
APPELLEES,

NOS. 99-4021, 99-4025, 99-4029

June 26, 2001

ORDER DENYING PETITION FOR REHEAERING AND FOR REHEARING EN BANC

The petitions for rehearing en banc are denied. Judges Bowman and Morris Sheppard Arnold would grant the petitions.

The petitions for rehearing by the panel are also denied. Judge Beam would grant the petitions.

Order entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS—APPELLANTS,

GREGORY F. WERSAL, INDIVIDUALLY,

PLAINTIFF,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,

PLAINTIFFS—APPELLANTS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,

PLAINTIFF,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION,

PLAINTIFF—APPELLANT,

MUSLIM REPUBLICANS, AN ASSOCIATION; MICHAEL MAXIM, INDIVIDUALLY; KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFFS,

V.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR,

DEFENDANT

BARRY M. LAZARUS, IN HIS CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HIS SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS

DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

MINNESOTA CIVIL LIBERTIES UNION, AMICUS ON BEHALF OF APPELLANT,

THE MINNESOTA STATE BAR ASSOCIATION; AMICUS ON BEHALF OF APPELLEE.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION; MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION; CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY; GREGORY F. WERSAL, INDIVIDUALLY; CAMPAIGN FOR JUSTICE, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF,

V.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR;

DEFENDANT,

BARRY M. LAZARUS, IN HIS CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HIS

SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON BEHALF OF APPELLEE.

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION,

PLAINTIFFS,

GREGORY F. WERSAL, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY,

PLAINTIFFS,

CAMPAIGN FOR JUSTICE, AN ASSOCIATION,

PLAINTIFF—APPELLANT,

MINNESOTA AFRICAN AMERICAN REPUBLIC COUNCIL, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION; MICHAEL MAXIM, INDIVIDUALLY,

PLAINTIFFS,

KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFF—APPELLANT,

V.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR;

DEFENDANT,

BARRY M. LAZARUS, IN HIS CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HIS SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR,

DEFENDANTS—APPELLEES,

THE MINNESOTA STATE BAR ASSOCIATION, AMICUS ON BEHALF OF APPELLANTS.

NOS. 99-4021, 99-4025, 99-4029

Submitted: May 10, 2000
Filed: April 30, 2001

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The issue before us in this appeal is whether Canon 5 of the Minnesota Code of Judicial Conduct, a rule promulgated by the Supreme Court of Minnesota to deal with political activity deemed inappropriate to judicial office, violates the First and Fourteenth Amendments of the United States Constitution. Canon 5 restricts candidates for judicial office from attending and speaking at partisan political gatherings; identifying their membership in a political party; seeking, accepting, or using a political party endorsement; announcing their views on disputed legal and political issues; personally soliciting campaign contributions; or authorizing or knowingly permitting others to do these things on the candidates' behalf. The district court[1] held that Canon 5's provisions, except for the restriction on candidates announcing their views on disputed legal and political issues, were narrowly tailored to serve a compelling state interest in maintaining the independence and impartiality of Minnesota's judiciary, did not offend equal protection, and were not impermissibly vague. *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 974-83 (D. Minn. 1999). As to the "announce" clause, the court concluded that a broad reading of the clause would raise constitutional difficulties. The court construed the clause narrowly to uphold its constitutionality, however, predicting that the Minnesota Supreme Court would do the same. *Id.* at 983-86. We affirm.

I.

The Minnesota Constitution provides that judges "shall be elected by the voters from the area which they are to serve," and that their term of office shall be six years. Minn. Const. art. 6, § 7. In 1912, the Minnesota General Assembly designated judicial elections as nonpartisan, meaning that party affiliation is not listed when candidates file for office, nor does it appear on the ballot. Act of June 19, 1912, ch. 2, 1912 Minn. Laws Spec. Sess. 4-6.

Ethical codes restricting the campaign conduct of judicial candidates have existed in Minnesota since at least 1950, when the Minnesota District Judges Association adopted by unanimous vote the ABA's Canons of Judicial Ethics (1924). In 1974, the Minnesota Supreme Court promulgated a code of judicial conduct that was based in large measure on the ABA's Model Code of Judicial Conduct (1972). Over the years, the Minnesota Supreme Court has revised its ethical rules, including those relating to a candidate's ability to attend and speak at political gatherings, to solicit campaign funds, and to discuss certain topics.

---

[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

Gregory Wersal, a Minneapolis-area attorney and long-time member of the Republican Party of Minnesota, ran unsuccessfully for the office of Associate Justice of the Minnesota Supreme Court in 1996 and 1998. The year Wersal launched his first campaign, the Minnesota Supreme Court revised its code of judicial conduct. The court renumbered and reorganized the canons and made several substantive changes, bringing the code largely in line with the 1990 version of the ABA's Model Code of Judicial Conduct.

Wersal interpreted one revision to lift a twenty-two-year ban on judicial candidates speaking to partisan political gatherings. From 1974 until 1996, Canon 7 of the Minnesota Code of Judicial Conduct barred candidates and judicial incumbents from speaking at partisan political gatherings, but allowed them to accept invitations to speak on their own behalf to other groups. Canon 7(A)(2) (1974) (a judicial candidate or incumbent "may accept invitations to attend and speak on his own behalf at other than partisan political gatherings"). It also prohibited judges from engaging in political activity except on behalf of measures to improve the law or the legal system. Canon 7(A)(4) (1974). In the 1996 revisions, the Minnesota Supreme Court reorganized and revised the subsections of Canon 7 and renumbered it as Canon 5. One subsection of the newly revised Canon 5 allowed candidates and judges to speak on their own behalf to gatherings generally, while another prohibited candidates and incumbents from attending political events. Canon (5)(A)(1)(a) & (d) (1996).

Consistent with his reading of the canon, Wersal, his wife Cheryl, and members of his campaign committee spoke at Republican Party gatherings as part of Wersal's 1996 bid for office. At these gatherings, they announced that Wersal was a member of the Republican Party and that he favored strict construction of the Constitution. They distributed campaign literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion as being "marked by their disregard for the Legislature and lack of common sense." In addition, the campaign committee sought unsuccessfully to obtain an endorsement by the Republican Party.[2]

In May 1996, a delegate to a Republican district convention filed an ethical complaint against Wersal with the Office of Lawyers Professional Responsibility. The Office of Lawyers Professional Responsibility, under the direction of the Minnesota Lawyers Professional Responsibility Board (collectively, the Lawyers Board), investigates and prosecutes ethical violations of lawyer candidates for judicial office. The complainant questioned the propriety of Wersal's attendance at Republican gatherings, the campaign committee's solicitation of partisan support, and the campaign materials critical of Minnesota Supreme Court decisions. The Director of the Lawyers Board dismissed the complaint, concluding that no disciplinary action was warranted under Canon 5.

In the Director's written determination, she first noted that it was unclear whether the Minnesota Supreme Court had intended to retain the ban on candidates speaking to political gatherings when it revised the code in 1996. Second, she pointed out that the 1996 version of Canon 5 restricted only candidates, and not their campaign committees, from soliciting publicly stated support. Finally, the Director expressed doubts about the applicability of the announce clause to Wersal's campaign statements. Citing several decisions from other jurisdictions in which similar language was either struck down or interpreted narrowly, she also questioned whether the clause was enforceable.

---

[2] At least in recent times, it has not been the norm in Minnesota for judicial candidates to seek political party endorsements or for political parties to consider endorsing them. The parties submitted no evidence that other judicial candidate campaign committees sought or were considered for such endorsements. In a February 10, 1998 letter, Wersal wrote a newspaper editor that "the Republican Party had never endorsed a judicial candidate before," and a June 20, 1998 Minnesota newspaper article characterized the Party's deliberation over whether to endorse Wersal as "a historic break with tradition." Party endorsements may not have been uncommon early in the twentieth century. *See Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579, 581-82 (1939) (Loring, J., concurring) (commenting on recent allegations of party treason directed at judges who issued decisions contrary to endorsing party's interests).

Ethical complaints are deemed confidential in Minnesota, but notification of the Director's initial determination whether a complaint should be dismissed summarily or investigated further is provided to the complainant and to the respondent lawyer. Sometime after Wersal received this notification, he withdrew his candidacy for the 1996 race, fearing that further ethical complaints would jeopardize his ability to practice law. In January of the following year, Wersal announced his candidacy for a supreme court seat opening up in 1998, and he and his campaign committee began campaigning as they had in the 1996 race, including the campaign committee's pursuing the Republican Party endorsement.

The Minnesota Board on Judicial Standards (the Judicial Board), the body charged with enforcing ethical codes against judges, petitioned the Minnesota Supreme Court in September 1997 to amend Canon 5, primarily to clarify the nonpartisan nature of judicial elections. The Judicial Board, which had become aware that Wersal's campaign committee was soliciting a political party endorsement, urged the court to add language that would limit the ability of candidates to identify themselves as members of a political organization and that would prevent campaign committees from seeking endorsements from political organizations. The Judicial Board also recommended that the court clarify that judicial candidates could not speak to political gatherings. Following a hearing, the court adopted each of these recommendations. Order Amending Canon 5 of the Code of Judicial Conduct, No. C7-81-300 (Dec. 23, 1997). The changes took effect January 1, 1998.

In February 1998, Wersal sought an advisory opinion from the Lawyers Board. He asked whether the Board would prosecute him for ethical violations if he spoke at political party gatherings or sought a Republican Party endorsement. He also inquired whether the Board would enforce the provision of Canon 5 restricting candidates from announcing their views on disputed issues. The Director answered by stating that Wersal would be subject to discipline regarding the first two actions he proposed, but that the Board could not advise him on the latter question since Wersal had not provided the Board with information about any particular statements he wished to make that might have been a view on a disputed legal or political issue. The Director also stated that the Board continued to have "significant doubts as to whether or not [the announce clause] would survive a facial challenge to its constitutionality" and that it would not enforce the provision unless the speech at issue violated other portions of the judicial ethics code.

A few days after he received this advisory opinion, Wersal filed this complaint under 42 U.S.C. § 1983 (1994), seeking declaratory and injunctive relief from the provisions of Canon 5. Joined as plaintiffs were the Republican Party of Minnesota (the Party), its affiliated organizations,[3] and several other individuals and organizations interested in Wersal's candidacy.[4] The complaint alleged that Canon 5 violated the free speech and association guarantees of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

---

[3] These affiliated organizations included the Indian Asian American Republicans, the Republican Seniors, the Young Republicans League of Minnesota, and the Minnesota College Republicans. The Minnesota African American Republican Council and the Muslim Republicans, also affiliated organizations, were later added as plaintiffs.

Wersal and the other plaintiffs moved for a temporary restraining order and/or preliminary injunction to enjoin the Lawyers Board and Judicial Board from enforcing Canon 5 so that Wersal would be free to participate in Republican precinct caucuses scheduled for early March 1998. The district court denied the motion,[5] and we subsequently affirmed. *Republican Party v. Kelly*, 996 F. Supp. 875 (D. Minn. 1998), *aff'd*, No. 98-1625, 1998 WL 764782 (8th Cir. Nov. 2, 1998).

While appeal of the district court's order was pending, Wersal continued his campaign, but was forced to cancel the numerous speaking engagements he had scheduled at the precinct caucuses and other Republican events. He wrote at least five persons who he knew intended to advocate his candidacy at these events and asked them not to do so because of his concern that someone might infer that he had "knowingly permitted" them to do so in violation of Canon

---

[4] Other plaintiffs included Wersal's campaign committee, and Party members Cheryl Wersal, Mark Wersal, and Corwin Hulbert. Michael Maxim, another member of the Minnesota Republican Party, and Kevin Kolosky, also a candidate for judicial office in 1996 and 1998, later joined as plaintiffs. Because the Party, its affiliated organizations, and its members Cheryl Wersal, Mark Wersal, and Corwin Hulbert have filed a single brief, we refer only to the Party when addressing their arguments. Likewise, we refer only to Gregory Wersal when addressing his contentions, those of Kolosky, and the campaign committee, who also have submitted a single brief.

[5] The district court found that the plaintiffs established a likelihood of success on their claim that the announce clause was unconstitutional, but concluded that the State's interest in maintaining a nonpartisan judicial election weighed against enjoining enforcement of all of Canon 5. *Republican Party v. Kelly*, 996 F. Supp. 875, 879-80 (D. Minn. 1998).

5. On advice of counsel, he declined to answer questions posed by members of the press and public when he thought answering might impermissibly disclose his views on disputed issues. His wife Cheryl and his brother Mark, a member of his campaign committee, refrained from taking part in certain campaign activities on Wersal's behalf for fear that their action would subject Wersal to discipline.

At the state Republican convention held in June, Michael Maxim, a delegate who was later joined as a plaintiff in this case, moved that the Party endorse Wersal. After considerable debate, the motion failed by a vote of 344 to 390. No other candidates for judicial office were nominated for endorsement. Because of the Republican Party's policy of not supporting candidates it had not formally endorsed, the Party did nothing to further Wersal's bid for office. His campaign ended when he came in third in the primary.

The parties filed cross motions for summary judgment. The district court found in favor of defendants on all claims. *Republican Party v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999). The court concluded that the State had compelling interests in maintaining the actual and apparent integrity and independence of the judiciary and that the restrictions on candidates' political activity and fund solicitation were narrowly tailored to serve those interests. *Id.* at 974-80. It also upheld the provisions against vagueness and equal protection challenges. *Id.* at 980-82. In its analysis of the announce clause, the court determined that the critical issue was whether the provision was narrowly tailored to serve the State's interest in maintaining the integrity and independence of the judiciary. The district court construed the clause to reach only the discussion of issues likely to come before the court, having considered that the Judicial Board had argued for a narrow interpretation of the clause and that the Minnesota Supreme Court, when possible, construes laws to prohibit their application to constitutionally protected expression. *Id.* at 985-86. The court then concluded that the provision did not offend the First Amendment. *Id.* at 986.

Wersal and those joined with him appeal,[6] challenging the determinations made by the district court.

II.

We review the district court's grant of summary judgment de novo, applying the same standard the district court applied to the motion. *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 729 (8th Cir. 1995). We will affirm if we conclude there are no genuine issues of material fact and the Lawyers and Judicial Boards are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v.*

---

[6] For the first time on appeal, the Lawyers and Judicial Boards contend that the plaintiffs who are not candidates for judicial office and cannot be sanctioned by the Boards lack standing to challenge Canon 5. Citing *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), the Boards argue that the plaintiffs' voluntary decisions not to advocate Wersal's candidacy do not constitute legally cognizable injuries. However, the plaintiffs have alleged more than the subjective "chilling" of their free speech rights held insufficient by the Supreme Court in *Tatum*, 408 U.S. at 13-14, 92 S. Ct. 2318. Wersal and the other plaintiffs have stated they were unable to associate with each other at political party gatherings and alleged they would have done so absent the ethical restrictions. Deprivation of the right to associate with others politically is a cognizable "injury in fact." *See Lerman v. Board of Elections*, 232 F.3d 135, 143 (2d Cir. 2000), *petition for cert. filed* (U.S. Feb. 28, 2001) (No. 00-1360); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000), *cert. denied*, [531 U.S. 1147], 121 S. Ct. 1085, 148 L. Ed. 2d 960 (2001) (No. 00-923). Because the plaintiffs' associational injuries are fairly traceable to Canon 5 and the injunctive relief they request will redress them, the plaintiffs have standing to assert their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (Article III standing requires plaintiffs allege "injury in fact" fairly traceable to defendant's conduct likely to be redressed by favorable court decision); *National Solid Waste Management Ass'n v. Williams*, 146 F.3d 595, 598 (8th Cir. 1998).

Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The plaintiffs contend that Canon 5 contravenes their First Amendment rights to freedom of speech and of association, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Tashjian v. Republican Party*, 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986).

Freedom of speech reaches its high-water mark in the context of political expression. Debate about the qualification of candidates for public office is at the core of our First Amendment freedoms, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989), valuable not only as a personal liberty, but also because of the role it plays in the proper functioning of our entire democratic form of government. *Burson v. Freeman*, 504 U.S. 191, 196, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992); *Brown v. Hartlage*, 456 U.S. 45, 52-53, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam). The closely related right of association is also particularly acute in the context of elections. *Eu*, 489 U.S. at 224-25, 109 S. Ct. 1013 (ban on endorsement in primary election acts at "crucial juncture" to prevent parties from promoting candidates who can translate shared ideas into action); *Buckley*, 424 U.S. at 15, 96 S. Ct. 612.

But even among restrictions that touch upon the core First Amendment rights to political speech and association, some restrictions are more burdensome than others, depending on the kind of activity that is restrained and on the nature of the restraint. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (standard of review depends on character and magnitude of burden on associational rights). In *Buckley v. Valeo*, both campaign contribution limits and expenditure limits affected core First Amendment expression and association interests, 424 U.S. at 14, 96 S. Ct. 612, yet the contribution limits placed a lesser burden on those interests than the expenditure limits did, *id.* at 19-23, 96 S. Ct. 612. Consequently, contribution limits have been reviewed under a less demanding standard. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 903- 04, 145 L. Ed. 2d 886 (2000).

In this case, the restriction applies to conduct of candidates for judicial office.[7] There are important differences between judicial office, on the one hand, and legislative or executive office, on the other, that affect the nature of the candidate's interest in certain kinds of policy debate.

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991). *Accord Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials ... in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *In re Chmura*, 461 Mich. 517, 608 N.W.2d 31, 39-40 ("[T]he differences between judges and other government officials bear on the strength of the state's interest in restricting political speech."), *cert. de-*

---

[7] We discuss the claim that Canon 5 also reaches the conduct of persons who are not judicial candidates *infra* at 873-75 [216a-220a].

nied, [531 U.S. 828], 121 S. Ct. 77, 148 L. Ed. 2d 40 (2000). Whereas affiliation with a partisan program is thus at the heart of executive and legislative campaigns, a State may conclude that it has no role in judicial campaigns because of the neutral, decision-making nature of the judicial function. "Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind .... [The judicial candidate] cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result." *Morial v. Judiciary Comm'n*, 565 F.2d 295, 305 (5th Cir. 1977). The judicial candidate simply does not have a First Amendment right to promise to abuse his office. *See Brown*, 456 U.S. at 54-56, 102 S. Ct. 1523 (some kinds of campaign promises "may be declared illegal without constitutional difficulty"); *In re Kaiser*, 111 Wash. 2d 275, 759 P.2d 392, 400 (1988) (holding statements of party affiliation do not refer to subject relevant to judicial qualification and therefore are not protected by First Amendment). Recognizing that the judiciary has a different job to do, Minnesota has provided that its judicial offices are nonpartisan. Minn. Stat. § 204B.06, subd. 6 (1998); *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). Thus, restrictions on Minnesota judicial candidates' speech are entirely different from limitations on the speech of candidates for partisan office, such as those in *Eu*, 489 U.S. at 217, 109 S. Ct. 1013 (striking statute making it misdemeanor for primary candidates to claim endorsement by party).

Another important aspect of the restraint in this case is that it does not discriminate in favor of one viewpoint or other. Minnesota's restraint of judicial candidates' First Amendment rights is a straightforward restriction of expression, rather than being incidental to some other type of regulation, such as a content-neutral time, place, or manner restriction, and in one sense, it is not content-neutral because it restricts speech on the basis of subject-matter. In

Burson v. Freeman, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), the Supreme Court considered a state law establishing a 100-foot "campaign-free" zone around polling places. Justice Blackmun rejected the assertion that the law was content-neutral: "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197, 112 S. Ct. 1846. Similarly, in this case, the bans on accepting political party endorsements, attending political party gatherings, identifying oneself as a party member, announcing views on disputed legal and political issues, and soliciting funds depend entirely on the subject matter of the speech. *See Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 2500, 147 L. Ed. 2d 597 (2000) (Souter, J., concurring) (government held to very exacting and rarely satisfied standard when it disfavors discussion of particular *subjects* or articulation of particular viewpoints).

However, the restriction in this case avoids discriminating against a particular viewpoint, which is the most serious threat to First Amendment rights. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-90, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (treating "content discrimination" not as an evil in itself, but as evidence that "official suppression of ideas is afoot"). In *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), the Supreme Court entertained a challenge to the Hatch Act, which prohibited federai employees from taking an active part in political management or political campaigns. The Court prefaced its analysis with the observation that the challenged restrictions did not discriminate on the basis of viewpoint:

> The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no ra-

> cial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

Id. at 564, 93 S. Ct. 2880. *Accord Morial*, 565 F.2d at 301-02 (requirement that sitting judge resign before running for a non-judicial office did not penalize belief in any particular idea and therefore did not touch core First Amendment values). Thus, although Canon 5 does burden First Amendment rights, the burden is less onerous than it might otherwise be because Canon 5 does not discriminate on the basis of viewpoint and because it governs only judicial elections.

Because the restrictions on the employees' rights in *Letter Carriers* were similar to those of Canon 5, the defendants suggest we look to *Letter Carriers* and cases following it, which judged restrictions on speech of government employees under a balancing test less rigorous than strict First Amendment scrutiny. *See Letter Carriers*, 413 U.S. at 564, 93 S. Ct. 2880. Wersal argues that we cannot apply the *Letter Carriers* balancing test to a restriction on his speech because he is not a government employee. But even though he is not presently a government employee, Canon 5 applies to him only insofar as he seeks to become one. The State can reasonably conclude that Wersal's actions as a candidate could affect his actions as a judge if he is elected, *see Buckley v. Valeo*, 424 U.S. at 26-27, 96 S. Ct. 612 (discussing danger of corruption from contributions to "current and potential office holders"), and so the reasoning of the balancing test cases fairly applies to him. However, the restrictions in this case are different from the Hatch Act provisions challenged in *Letter Carriers* because, while the Hatch Act restrained political activity of government employees, Canon 5 restrains the activity of candidates engaged in an election contest. The burden on the plaintiff in either case may be comparable, but the public's interest in free speech is greater where the person subject to restrictions is a candidate for public office, about whom the public is obliged to inform itself. Therefore, we will invoke strict scrutiny and examine the restrictions at issue to determine whether they are narrowly tailored to serve a compelling state interest.[8] *See Stretton*, 944 F.2d at 141-42; *see generally California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 2412, 147 L. Ed. 2d 502 (2000); *Burson*, 504 U.S. at 198, 112 S. Ct. 1846; *Brown*, 456 U.S. at 53-54, 102 S. Ct. 1523.

III.

The governmental interests put forth to justify Canon 5 are undeniably compelling. The Boards contend that the restrictions are necessary to guarantee the independence of the Minnesota judiciary, which in turn is crucial to preserve the justice of its courts of law and its citizens' faith in those courts. There is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order.

> Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others .... Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time ....

Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993). *Accord Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("There can be no question ... that a state has a compelling interest in the integrity of its judiciary .... If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

---

[8] The effects of Canon 5 on speech and associational rights, respectively, are so closely intertwined that, having decided to apply strict scrutiny because of the effects on speech, we need not consider whether the effects on associational rights alone would have called for a less rigorous standard.

The plaintiffs contend that Minnesota has no interest in the independence of its judiciary because it has chosen to make its judges stand for election. Wersal says: "Contrary to popular understanding—even among lawyers—Minnesota does not have an 'independent' judiciary. Minnesota has an elected judiciary that its founding citizens specifically adopted in the Minnesota Constitution to insure its judiciary was not 'independent' from the voters." Wersal argues that when the citizens at the Democratic[9] Minnesota constitutional convention in 1857 debated whether the judiciary should be appointed or elected, they considered the then-recent *Dred Scott*[10] decision. They decided to choose judges by election and to give them finite terms, rather than life tenure, in order to retain the ability to oust unsatisfactory judges.

The Minnesota Supreme Court has considered the broad history of Minnesota judicial elections and has concluded that the State has historically pursued the ideal of an independent judiciary. In *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), the Minnesota Supreme Court considered an equal protection challenge to Minn. Stat. § 204B.36, subds. 4 and 5 (1990), which provided that an incumbent judge should be designated as such on the ballot. In explaining the reason for the designation, the court identified the underpinnings of the Minnesota selection process as the search for an independent judiciary:

---

[9] In Minnesota there were two constitutional conventions, one Democratic and one Republican. The two drafts resulting from those conventions were consolidated and then submitted for ratification. *Peterson v. Stafford*, 490 N.W.2d 418, 420 n. 10 (Minn. 1992).

[10] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856).

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences[11] .... While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Id. at 420. *Peterson* traced the history of the Minnesota judicial selection process beginning with the adoption of the Minnesota Constitution in 1857, which provided that judges of the Supreme Court should be elected for seven-year terms, Minn. Const. art. 6, § 3 (1857), so that judicial elections did not coincide with elections for other offices. 490 N.W.2d at 420. Moreover, the 1857 Constitution provided that judges must be "learned in the law." Minn. Const. art. 6, § 5 (1857). "Implicit in this requirement is recognition that those elected as judges will be subject to the restrictive canons of conduct governing the profession of law." 490 N.W.2d at 422. The term length was reduced to six years in

---

[11] The Minnesota Supreme Court has thus with great precision and specificity answered the dissent's rhetorical question, "Independent from what?" *Infra* at 886.

1883, which made more apparent the "difficulties associated with partisan judicial elections." *Id.* at 420. In 1912, the legislature enacted nonpartisan ballot legislation, Act of June 19, 1912, ch. 2, 1912 Minn. Laws, Spec. Sess. 4-6, which made the State's judicial offices nonpartisan. *See id.* at § 182. The court characterized this reform as an attempt to ensure the "judicial impartiality required to decide cases free from political maneuvering." 490 N.W.2d at 422.

Further, the Minnesota Constitution provided that whenever there was a judicial vacancy, the governor should appoint the successor, who would serve until his successor was elected.[12] Minn. Const. art. 6, § 10 (1857). In 1972, at the time when the State was studying the possible advantages of a merit selection plan, the time frame for this successor election was extended from the next general election occurring more than thirty days after the vacancy to the next general election occurring more than one year following the vacancy, in order to allow the electorate enough time to assess the new judge's competence. Minn. Const. art. 6, § 8 (amended 1972); *see Peterson*, 490 N.W.2d at 422-23.

In the context of this history, *Peterson* held that the ballot designation of the incumbent was rational:

> It seems clear that Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a quasi-retention feature which simply informs the voter who the incumbent candidate is and who the challenger is. This arrangement acts as a check on the gubernatorial appointment process by keeping the

---

[12] Since 1991 a judicial selection commission, which is composed of members appointed by the governor and by the justices of the supreme court, evaluates the merits of applicants for mid-term vacancies and recommends to the governor three to five nominees for each open position. Minn. Stat. §§ 480B.01, subds. 2, 8-11 (1998).

> ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function.

490 N.W.2d at 425. Thus, the Minnesota Supreme Court has considered in depth the history and structure of Minnesota judicial elections procedures and has concluded that they are designed in large part to protect the independence of the State's judiciary.[13]

Other courts considering the same question have held that the decision to elect judges cannot be regarded as abandonment of a State's interest in an independent judiciary. *See Buckley*, 997 F.2d at 227 ("Judges remain different from legislators and executive officials, even when all are elected . . . ."); *Stretton*, 944 F.2d at 142 ("The fact that a state chooses to select its judges by popular election . . .

---

[13] The dissent concludes that *Peterson*'s use of the phrase "independent 'as possible,'" *infra* at 891 [249a], must be viewed, not in light of *Peterson*'s detailed historical review, but rather in light of the dissent's independent review of Minnesota history. *See infra* at 886-90 [240a-249a]. The deference we must give to state court opinions on matters of state law does not allow us to supplant *Peterson*'s considered views in favor of our own de novo interpretation, nor may the dissent. The dissent also states that Canon 5 "subverts" Minnesota's policy, *infra* at 890 [224a], and seemingly presumes that Canon 5 is not part of state law because it emanates from the state supreme court, rather than from the state legislature. No one, including the dissent, has questioned the authority of the Minnesota Supreme Court to promulgate ethical rules for incumbent judges and judicial candidates. The same federalism principles which require us to defer to state courts' interpretations of state law and to recognize that state laws embody the will of a State also dictate that we recognize Canon 5 as a regulation that expresses Minnesota's will as a sovereign entity. *See Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 534, 148 L. Ed. 2d 388 (2000) (Rehnquist, C.J., concurring) ("in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character").

does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."); *In re Chmura*, 461 Mich. 517, 608 N.W.2d 31, 39-40 ("By providing for the election of judges, the people of Michigan have not transformed judges into legislators or executives . . . ."), *cert. denied*, [531 U.S. 828], 121 S. Ct. 77, 148 L. Ed. 2d 40 (2000).

The governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality. *See Cox v. Louisiana*, 379 U.S. 559, 565, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965) ("A State may also properly protect the judicial process from being misjudged in the minds of the public."); *Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (State's interest in preventing judicial corruption or appearance of corruption compelling); *cf. Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 547 (8th Cir. 1984) ("It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife."). *Letter Carriers* stressed that the appearance of corruption resulting from partisan activities of government employees could affect the entire government: "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565, 93 S. Ct. 2880.

Finally, a State has an interest in protecting its judges from pressure to participate in partisan activities, if it reasonably concludes that this protection is necessary to retain a high caliber of judges. "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (Stewart, J., concurring in judgment). *Letter Carriers* applied an analogous principle when it justified the Hatch Act partly on the ground that it meant to protect government employees from political pressure from their superiors. 413 U.S. at 566-67, 93 S. Ct. 2880.

We therefore conclude that the Lawyers and Judicial Boards have shown compelling governmental interests[14] to justify Canon 5, and we turn to the necessity and narrow tailoring of the various restrictions found within it.

IV.

We first address Wersal's challenge to the three provisions of Canon 5(A) that prohibit him from attending political party gatherings; from seeking, accepting, or using endorsements from a party; and from identifying himself as a member of the party, except as necessary to vote. Minn. Code of Jud. Conduct Canon 5(A)(1)(a) & (d) (1998).[15]

---

[14] In arguing that the state interests we have identified are not compelling, the dissent relies on *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978), in which the State sought to govern not the conduct of judges, but of the press in reporting on judicial disciplinary proceedings. The dissent's discussion of *Landmark Communications* suggests that the compelling interest we rely on is protection of judges from criticism. *Infra* at 897 [261a]. We rely on the State's interest in its judges' integrity and independence, which requires keeping judges from doing (or appearing to do) things that compromise their neutrality, rather than keeping others from talking or writing about them. Minnesota seeks not to "shield[ ] judges from published criticism," *infra* at 898 [263a] (quoting *Bridges v. California*, 314 U.S. 252, 270-71, 62 S. Ct. 190, 86 L. Ed. 192 (1941)), but to prevent them from deserving such criticism. Moreover, the Supreme Court in *Landmark Communications* did not reject the legitimacy of the State's proffered interests in the reputation of its judiciary and the integrity of its disciplinary proceedings, but held that the State had not shown that these interests would be "seriously undermined" unless the State could use criminal sanctions against the defendant newspaper. *Id.* at 841, 845, 98 S. Ct. 1535.

[15] Canons 5(A)(1)(a) and (d) provide:

A.

We must determine whether these restraints protect Minnesota's interests in the integrity and quality of its judiciary. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1891, 146 L. Ed. 2d 865 (2000). The burden of proof rests with the State. *Id.* at 1888.

A threshold question is what sort of evidence the Boards must provide substantiating the threat to the governmental interest. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000), the Supreme Court declined to answer this question definitively, *id.* at 907, but gave this guidance: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 906. The asserted danger to the governmental interest in that case, danger of corruption attendant on large campaign contributions, was neither novel nor implausible, so that the State's burden was amply satisfied by its production of a state senator's affidavit and newspaper articles showing cases of apparent corruption. *Id.* at 907-08. The Court also assigned some evidentiary value to the passage of a campaign contribution limitation by a large margin at a referen-

---

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd. 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

> (a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election.
>
> ....
>
> (d) attend political gatherings; or seek, accept or use endorsements from a political organization ....

dum, which demonstrated public concern about corruption.[16] *Id.* at 908. The Court quoted *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), in which the city's evidence was said to be adequate, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 907 n. 6. *Shrink Missouri* also noted the lack of evidence tending to disprove the State's theory. *Id.* at 908.

The idea that judicial integrity is threatened by judges deploying political organizations in connection with campaigns for judicial office is neither novel nor implausible. In *Letter Carriers*, the Supreme Court recognized that partisanship of governmental officials created a risk of corruption that justified the restraint of those officials' partisan activities. Although the Hatch Act applied to employees of the executive branch, the Court's reasoning could as well have been written about judges and in fact applies with even greater urgency to them:

> It seems fundamental in the first place that employees in the Executive Branch of the government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take

---

[16] We held the voter initiative imposing contribution limits invalid under the First Amendment in *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995); consequently, its restrictions were not in force when *Shrink Missouri* was decided.

> formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 563-64, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). *Accord LaMontagne v. St. Louis Dev. Corp.*, 172 F.3d 555, 557 (8th Cir. 1999) (city employees), *cert. denied*, 528 U.S. 873, 120 S. Ct. 176, 145 L. Ed. 2d 148 (1999); *Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 547 (8th Cir. 1984) (police officers); *Otten v. Schicker*, 655 F.2d 142, 144 (8th Cir. 1981) (same).

The restriction here was adopted by the Minnesota Supreme Court, which has consistently over time perceived partisanship as posing a particular threat to judicial integrity. Canon 7(A) of Minnesota's 1974 Code of Judicial Conduct also restricted a judicial candidate's political activities broadly, specifically permitting a candidate for elective judicial office to appear at "*other than partisan political gatherings* during the year in which he is a candidate." Minn. Code of Judicial Conduct Canon 7(A)(2) (1974) (emphasis added). The comments of the advisory committee accompanying the 1995 Minnesota Code of Judicial Conduct state: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor." Canon 1(A) cmt. In proposing to the court the 1997 amendments to clarify the prohibitions on partisan conduct the Judicial Board stated: "The Judicial Standards Board members believe the proposed language changes will make it clear that judicial elections are to be nonpartisan. Minnesota has a long tradition of nonpartisan judicial elections, and these changes will assure a strong, independent judiciary."

Long before the present canons were adopted, justices of the Minnesota Supreme Court had also expressed the idea that merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement. In *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939), a candidate for registrar of deeds, an office designated by statute as nonpartisan, had solicited and received the endorsement of a political party. The court held that the Minnesota nonpartisan statute prescribed only that the candidate's party affiliation could not appear on the ballot and that the candidate could not declare his party when filing for office. The statute did not forbid party endorsement of candidates for nonpartisan office. 288 N.W. at 581. Justice Loring, joined by Justice Olson, concurred specially to add that this statute was not sufficient to protect the State's judiciary from the dangers of partisan pressure, which he felt had been at work:

> When candidates for such offices were placed on a non-partisan ballot it was, it seems to me, the purpose of the legislature to lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions on matters where party programs, party interests or even prominent party leaders might be involved. The abuse and accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing party ought to be evidence enough of the impropriety of party indorsements and of their purpose to induce partisan political rather than impartial judicial decisions.

Id. at 581-82.

More recently, the court in *Peterson v. Stafford*, 490 N.W.2d 418, 425 (Minn. 1992), stated that the nature of judicial office requires the "holder studiously to avoid partisan politics, refrain from all discussions of public issues and restrict one's membership and participation in organization to those primarily of a professional nature."

Additionally, the Boards have adduced evidence of the necessity of reform measures in the form of affidavits by a former governor, Arne H. Carlson, and a former Chief Justice of the Minnesota Supreme Court, A.M. (Sandy) Keith. Chief Justice Keith was a member of the Minnesota Supreme Court when the Court considered and approved the amendments to Canon 5. He testified that, based on his experience, if the Minnesota Code were changed to permit partisan activity, judges would be under pressure to "decide cases in ways that would impress the judge's supporters favorably," and eventually, partisanship would damage the public's confidence in the judiciary. Governor Carlson testified: "For the public to read newspaper headlines that a political party has endorsed and will work to elect a particular candidate would greatly harm the public's confidence in the independence of the judiciary." Both Chief Justice Keith and Governor Carlson testified that they believed that allowing judicial elections to become partisan contests would discourage many qualified candidates from seeking election.

The Boards have also produced a news account of the dangers partisan elections have posed in Texas, which included interviews with witnesses who believed that judges' decisions were affected by the need for political and financial support and that the public perceived "that justice is for sale in this state." Editorials from Texas newspapers reported a public perception that rulings were influenced by campaign obligations. The testimony at the 1997 hearing before the Minnesota Supreme Court on the proposal to amend Canon 5 was replete with references to the undesirable situation existing in other States with partisan judicial elections, particularly Texas. *Amendment to Canon 5 of the Code of Judicial Conduct: Hearing Before the*

Minnesota Supreme Court, No. C7-81-300, at 32, 36, 50, 65-68 (1997).

In contrast to the evidence amassed by the Boards, the plaintiffs have not adduced evidence tending to disprove the threat to the integrity or reputation of the judiciary from involvement with partisan politics. *See Shrink Mo.*, 120 S. Ct. at 908. This is an issue where "a long history, a substantial consensus, and simple common sense," *Burson*, 504 U.S. at 211, 112 S. Ct. 1846, combine to show that regulation is necessary to protect the institution of the judiciary from the dangers of partisanship and corruption. The record suffices to support the Minnesota Supreme Court's assessment that the threat of actual and apparent corruption is real and reform measures are necessary. *Cf. Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 229, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (striking ban on party endorsement of candidates in party primaries where there was no evidence that ban served purpose of preventing fraud and corruption). Additionally, there is record evidence showing that without protection from partisan pressures, the State will be less able to recruit judicial candidates of the highest caliber.

The dissent contends that Canon 5 is not necessary because it does not achieve its stated end. *Infra* at 899-900 [265a-266a]. The argument is not precisely that Canon 5 does not accomplish its end as far as it goes, but that it is underinclusive—in other words, that the measure does not eliminate all the conduct posing the threat the government claims to be addressing because a candidate may attend meetings of and accept endorsements from politically active groups other than political parties. The dissent contends that in cases burdening a fundamental right "failure to solve the entire asserted problem is fatal." *Infra* at 900 [266a] n. 44 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)). Wersal makes a similar argument, relying on *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980), and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). These cases do not stand for such a broad rule. Generally, underinclusiveness of a speech regulation is not an independent ground for invalidating the regulation, but rather points to the possibility that the government is discriminating on the basis of content or that the government's asserted interest is not truly pressing. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51-53, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997) (Souter, J., dissenting). When underinclusiveness of a regulation betrays content-discrimination, the standard of review must be raised to strict scrutiny. For instance, *R.A.V.* invalidated an ordinance prohibiting fighting words directed at some groups, but not others. The Supreme Court held that the principle for distinguishing between fighting words that were prohibited by the ordinance and those that were not had nothing to do with the rationale for permitting regulation of fighting words in the first place, but instead amounted to content discrimination. Therefore, the Court could not apply the relaxed standard appropriate for review of regulations of fighting words. 505 U.S. at 386, 112 S. Ct. 2538. The ordinance failed under strict scrutiny review. *Id.* at 395-96, 112 S. Ct. 2538. In this case, we have already established that Canon 5 discriminates on the basis of content (though not on the basis of viewpoint) and that we must conduct strict scrutiny. *Supra* at 863-64 [198a-199a].

In cases in which underinclusiveness of a regulation suggests that the regulation is not truly necessary to further a compelling governmental interest, the government's obligation is to "establish the empirical reality of the problems it purports to be addressing." *Glickman*, 521 U.S. at 493, 117

S. Ct. 2130 (Souter, J., dissenting). As part of our strict scrutiny, we have determined that the State established that a candidate's use of political parties in judicial campaigns poses a real threat to the State's compelling interests. *Supra* at 861-71 [194a-213a]. Thus, we have already undertaken the heightened scrutiny that underinclusiveness of a regulation would suggest is necessary.

But even if the cases cited by the dissent and Wersal indicated that underinclusiveness poses a First Amendment problem in its own right, these cases concern only arbitrary underinclusiveness, which arises when the principle for distinguishing regulated conduct from non-regulated conduct does not promote the government's asserted purpose. In *Carey*, 447 U.S. at 457, 464, 100 S. Ct. 2286, the challenged regulation prohibited residential picketing other than labor picketing in order to protect residential privacy. In *Discovery Network*, 507 U.S. at 415, 113 S. Ct. 1505, the city banned use of newsracks to distribute commercial handbills, but not newspapers, as a way of preventing newsracks from becoming a safety hazard and eyesore. The types of picketing and newsracks, respectively, that were regulated posed no greater threat to the asserted governmental interest than those that were exempted from regulation, and the regulations were thus invalid. *See Carey*, 447 U.S. at 465, 100 S. Ct. 2286; *Discovery Network*, 507 U.S. at 424-28, 113 S. Ct. 1505. In *44 Liquormart* a ban on advertising alcoholic beverages was invalid where any connection between the advertising ban and the State's desired result of reducing alcohol consumption would have been "purely fortuitous." 517 U.S. at 506-07, 116 S. Ct. 1495 (Opinion of Stevens, J.).

In contrast to these cases, when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment. *See, e.g., Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 470-71 (8th Cir. 1991); *Stretton v. Disciplinary Bd.*, 944

F.2d 137, 146 (3d Cir. 1991) ("[W]e cannot say that the state may not draw a line at the point where the coercive effect [of judicial campaign fund-raising], or its appearance, is at its most intense—personal solicitation by the candidate."). Indeed, a categorical rule against underinclusiveness for its own sake would coerce governments to regulate speech more broadly than they consider necessary, which is hardly the usual goal of First Amendment jurisprudence.[17] Here, the State has shown that a candidate's use of political parties in judicial campaigns poses a greater threat to the compelling state interests than involvement of other kinds of groups. *See infra* at 39-40 [221a-222a]. Therefore, the State did not violate the First Amendment in so limiting Canon 5.

B.

As the final step of our review of the three restrictions on Wersal's political activity, we ask whether they are narrowly drawn to address the compelling state interests. *See California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 2412, 2414, 147 L. Ed. 2d 502 (2000); *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (restriction must operate without "unnecessarily circumscribing protected expression").

The Minnesota Supreme Court has attempted to prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their independence, while allowing them alternative means of communicating subjects of valid interest to voters. Candidates may, for instance, speak to gatherings other than political organization gatherings; appear in newspaper, television, or other media advertisements supporting their candidacy; and distribute pamphlets and other promotional literature.

---

[17] It is significant that the dissent in this case first argues that the Minnesota Supreme Court has violated the Constitution in enacting Canon 5, and then makes the antithetical assertion that it has not gone far enough.

Canon 5(B)(1). Furthermore, candidates may establish committees to campaign for them in various ways, including obtaining public statements of support (other than from political organizations). Canon 5(B)(2).

Wersal argues that since various other States and the drafters of the ABA Model Code of Judicial Conduct have not found it necessary to forbid attendance at party gatherings, acceptance of party endorsements, and identification of party affiliation, Minnesota's restrictions must be broader than necessary. But Wersal relies on the laws of States that have in fact limited political activity by measures similar to those before us.[18] There is also the authority of *Letter Carriers* and the other cases in which courts held it was proper to limit partisan political activity of executive employees. *See supra* at 867-68 [198a-200a].

The Party contends that the prohibition on disclosing party affiliation is not narrowly tailored because it prohibits disclosing past party affiliation as well as present. The Judicial Board states that it "simply prevents the judge from affirmatively stating his *current* political affiliation." However, the report submitted to the Minnesota Supreme Court at the time the party affiliation language was adopted states that it would prohibit candidates from identifying themselves "as past or present members of a political organization." The language was adopted as proposed. The Minnesota Supreme Court apparently concluded that the public would infer that identification of past membership was tantamount to identification of present membership. *See In re Kaiser*, 111 Wash. 2d 275, 759 P.2d 392, 395 (1988) (en banc) (concluding judge violated prohibition on stating party affiliation by stating past affiliation). It was therefore reasonable to extend the prohibition on stating party affiliation to include past affiliation as well, lest the measure be rendered ineffective.

---

[18] *E.g.*, Fla. Code of Jud. Conduct Canon 7(C)(3) (imposing various limits on speaking at political gatherings, including prohibition on announcing party affiliation); Ky. Sup. Ct. R. 4.300, Canon 5(A)(2) (allowing candidate to state party affiliation only in response to direct question); Okla. Stat. Ann. tit. 20, § 1404(B)(6) (West 1991 & Supp.) (making it a ground for removal of judge from office to make party affiliation publicly known in connection with campaign for office); Or. Code of Jud. Conduct JR 4-102, 4-104 and Or. Rev. Stat. § 249.015 (1999) (candidate shall not publicly identify candidate's political party membership except by registering to vote); S.D. Code of Jud. Conduct Canon 5(C)(1)(a)(ii) (permitting candidate to identify party affiliation only to vote); Wash. Code of Jud. Conduct Canon 7(A)(1)(e) (same).

The Party further contends that Canon 5 is not narrowly tailored because Canon 5(A)(3) applies to a candidate's supporters as well as to the candidate. Specifically, Maxim argues that he had to avoid "seeking out any relationship with Gregory Wersal" in order to avoid coming within the scope of persons who were prohibited by Canon 5(A)(3) from doing for Wersal what he could not do for himself—i.e., attending a party gathering or seeking a party endorsement. Similarly, the members of Wersal's campaign committee contend that the restriction is overbroad because the committee was prohibited from seeking a party endorsement of Wersal. This argument has two parts: first, that the regulation is overinclusive because it affects third parties who have a relationship with Wersal; and second, that the regulation is vague because third parties cannot predict under what circumstances their actions will be imputed to Wersal.

Two district court cases have anticipated the overinclusiveness issue. In *Concerned Democrats v. Reno*, 458 F. Supp. 60, 65 (S.D. Fla. 1978), and *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996), courts held that state laws prohibiting political party endorsements of judicial candidates or of all nonpartisan candidates, respectively, were not narrowly tailored because they restricted the political parties' behavior when it was only necessary to restrict the candidate's behavior. *Lungren* assumed, arguendo, that the State had a compelling interest in preventing nonpartisan office holders from engaging in partisan activity, but held that the law "misse[d] the mark" in addressing that interest:

> The evil sought to be combatted is the unseemly partisanship of nonpartisan officeholders once they are in office, not the partisanship of political parties (which, of course, is the very nature of political parties). Section 6(b) purports to prevent officeholders from being "beholden" to political parties by imposing a ban on the parties' speech about candidates for office, rather than (as the Supreme Court approved in *Letter Carriers*) a ban on the partisan political conduct of the officeholders themselves. The distinction is crucial. The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices.

919 F. Supp. at 1402.

These district court cases convincingly reason that because the State's compelling interest is in the rectitude of the candidate, a narrowly tailored restriction will regulate expressions by the candidate, not third parties. However, the language of Canon 5(A)(3) is so limited. It does not purport to govern what other persons do, but what the candidate authorizes or knowingly permits them to do. The canon therefore does not affect persons not subject to the candidate's authority and control. *See Johnson v. Holzemer*, 263 Minn. 227, 116 N.W.2d 673, 679 (1962) ("knowingly permit" extends only to persons having right of authoritative control over actor who are actually aware of his or her activity). Canon 5(A)(3) simply prohibits the candidate from accomplishing by the acts of an agent what the candidate is forbidden to personally. The Director of the Lawyers Board, the body charged with enforcing Canon 5(A)(3) in Wersal's case, confirms that there is no threat of disciplinary action without the candidate himself authorizing or permitting the action of the supporter. Insofar as Canon 5(A)(3)(a) refers to members of the candidate's family, it does not limit their activities, but rather affects the candidate's actions towards them: the candidate shall "encourage" them to adhere to the standards applicable to the candidate. As for persons who are within the candidate's authority and control as members of the candidate committees authorized by Canon 5(B)(2), they have voluntarily assumed that relation, and therefore may subject themselves to certain restraints which are necessary to make effective the restrictions on the candidate. *Cf. Letter Carriers*, 413 U.S. at 581-82, 93 S. Ct. 2880 (Appendix to the Court's opinion) (United States Civil Serv. Comm'n Form No. 1236, which Congress intended to serve as its definition of the general proscription against partisan activities, *id.* at 572-74, 93 S. Ct. 2880, prohibits "activity by indirection" when, by collusion or coercion, employee causes another to do what employee may not do directly). The limitation of Canon 5's reach to the candidate and to persons within the candidate's control thus distinguishes this case from *Eu*, 489 U.S. at 221, 109 S. Ct. 1013, in which there was an "outright ban" on political parties endorsing candidates.

The Party argues that a candidate's supporters cannot tell under what circumstances their actions will be imputed to the candidate. A restriction on speech must not be so vague that people of ordinary intelligence cannot tell what it prohibits. *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). *But see Berger v. Supreme Court*, No. 87-3935, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) (notice requirements less stringent in enforcing non-criminal code of judicial conduct than if criminal penalties at stake). Canon 5(A)(3)(c) limits the scope of its language by adding the requirement that the candidate's permission be "knowing." This requirement prevents the sort of violation by mistake the non-candidate plaintiffs claim has chilled their speech. *See Chulchian v. City of Indianapolis*, 633 F.2d 27, 31 (7th Cir. 1980) (ordinance prohibiting person from "permitting" conduct includes requirement that person know of conduct and therefore is not unduly vague). Moreover, both Canon 5(A)(3)(a), dealing with family members, and Canon 5(A)(3)(c), dealing with authorizing or knowingly permitting others to act, include the concept of the candidate's right to control the speaker. *Johnson*, 116 N.W.2d at 679. Canon 5(A)(3) is therefore not unduly vague.

C.

The Party contends that the restrictions on a candidate's partisan activity violate its rights to equal protection because Canon 5 restricts association with political parties, but not other organizations that could affect a judge's independence or the public's perception of that independence. We have already determined that the restraints on Wersal's speech and association are necessary to serve a compelling state interest. To conclude that the same restraints violate the Equal Protection Clause, we would have to determine that Canon 5 burdens the rights of political party members more than others and that "such differential treatment is not justified." *California Med. Ass'n v. FEC*, 453 U.S. 182, 200, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981). In *Broadrick*, in rejecting a First Amendment overbreadth challenge to Oklahoma's restrictions on partisan activities by government employees, the Supreme Court also rejected an equal protection challenge to the same law:

> Appellants also claim that § 818 violated the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving

> unclassified personnel free from such restrictions . . . . [T]he legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

413 U.S. at 607 n. 5, 93 S. Ct. 2908 (citation omitted).

Our discussion regarding the State's interest in the independence of its judiciary demonstrates how Minnesota has historically viewed partisanship as a particular threat to the integrity of its courts, *supra* at 869-71 [209a-212a], and we need not reiterate this discussion. Restrictions reaching only partisan, rather than nonpartisan, political activity have been upheld in other cases. *See Letter Carriers*, 413 U.S. at 562, 93 S. Ct. 2880; *Bauers v. Cornett*, 865 F.2d 1517, 1524-25 (8th Cir. 1989) (application of statutes to nonpartisan activity would have raised a different constitutional question than application to partisan activity). Political parties specialize in the business of electing candidates and have a powerful machinery for achieving that end, including large membership and fund-raising organizations. Those parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues. Finally, legislatures are bodies in which, for the most part, the members owe allegiance to a political party, not only for financial support and endorsement in their campaigns for office, but also for political support within the legislative process itself. No single legislator has the power to enact laws. Therefore, the sharing of common partisan affiliation plays an integral role in enactment of legislation. If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it.

It is also relevant that a judge's participation in associations other than political parties is regulated by Canon 4, which imposes broad requirements that judges avoid involvement that could cast doubt on their impartiality or interfere with proper performance of their judicial duties. At the Minnesota Supreme Court's 1997 hearing on amending Canon 5, DePaul Willette, Executive Secretary of the Judicial Board, testified that the danger of judicial candidates affiliating with single-issue interest groups was adequately addressed by the provision of Canon 5 prohibiting announcement of the candidate's views on disputed legal or political issues, Canon 5(A)(3)(d)(i). *Amendment of Canon 5 of the Code of Judicial Conduct: Hearing before the Minnesota Supreme Court*, No. C7-81-300, at 12-13 (1997).

We conclude that the State has justified its differential treatment imposing greater restrictions on a judicial candidate's partisan political activities than on association with other kinds of organizations.

V.

We turn next to Wersal's claim that Canon 5's "announce" clause, which prohibits judicial candidates from announcing their "views on disputed legal or political issues,"[19] violates his free speech rights because it is not narrowly tailored to achieve any compelling state interest.[20] We have already determined that the interests proffered by the State to justify this restriction are compelling governmental interests of the highest order, so we proceed to the next step of our inquiry and address whether the restriction is necessary to further these interests. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1891, 146 L. Ed. 2d 865 (2000); *see also Brown v. Hartlage*, 456 U.S. 45, 53-54, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982).

---

[19] Canon 5(A)(3)(d)(i) provides that a judge or a candidate for judicial office shall not:

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent.

A.

As we have discussed, it is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial officers, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts. At the time of the campaign, the candidate simply cannot predict what the facts or arguments in a particular case may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision. *See Berger v. Supreme Court*, No. 87-3935, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) ("[T]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office.") (internal quotations omitted); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (free discussion of judicial candidate's views conflicts with the "historically more deeply rooted" concept of justice under the law); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) (prejudging cases at campaign stage makes mockery of the concept of an impartial judiciary and undermines public confidence in rule of law).

---

[20] Wersal also challenges the announce clause as being vague. However, his argument is based solely on the clause's relationship to Canon 5(A)(3), which prevents him from "knowingly permit[ting]" others to announce his views on his behalf. We have already held *supra* at 875 that the "knowingly permit" language is not unconstitutionally vague, and we therefore reject this claim. Furthermore, our clarification of the "knowingly permit" language is dispositive of the Party's claim that the announce clause is unconstitutional as applied to third parties. Candidates are subject to discipline only when third parties act as agents of the candidate or have voluntarily assumed a relationship with the candidate as a member of the candidate's campaign committee. The Code does not regulate the independent activities of third parties.

Canon 5's announce clause restrains candidates from making statements in their campaigns about their views on disputed legal and political issues, and thus prevents candidates from implying how they would decide cases that might come before them as judge. Wersal maintains that this restriction is not necessary because Canon 5 already protects the State's interests through bans on candidates making pledges or promises of conduct in office other than the faithful performance of their duties and on candidates manifesting bias or prejudice inappropriate to the judicial office. *See* Canon 5(A)(3)(d)(i) & (ii).

To be sure, the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office—pledges by candidates to make specific decisions on the bench. However, it does not reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary. It would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies. *See Laird v. Tatum*, 409 U.S. 824, 836 n. 5, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972) (Rehnquist, J.) (Mem. on Motion for Recusal) ("In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.").

When a candidate is later called upon as a judge to preside over cases involving disputed issues about which he or she has made campaign announcements, the judge is placed in an awkward, if not impossible, position. Should the judge properly determine, for example, that a law violates the Constitution, having already expressed this opinion during the campaign, the judge risks appearing as though he or she prejudged the case rather than gave it due consideration in light of the law, arguments, and facts. This apparent rigidity can undermine the faith of the litigants and public in the judge's decision and in the State's judicial system generally. *See Stretton*, 944 F.2d at 142. On the other hand, should the judge reach a conclusion that departs from the opinion expressed during the campaign, the judge risks being assailed as a dissembler. Thus, the judge may hesitate to decide the case in a way that might lose votes at the next election. Certainly, many judges have the fortitude to resist such pressures, but we do not doubt that the potential of supporter abandonment at the next election can weigh heavily on judges who know they were elected based on representations they made during the last campaign. *Cf. The Federalist No. 78*, at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing against periodic popular election of judges because it gives them "too great a disposition to consult popularity" when rendering decisions).

Wersal does not explain why he believes the canon restricting candidates from manifesting bias or prejudice inappropriate to judicial office fully protects the State's interests left unshielded by the ban on candidates making improper pledges and promises, and we conclude it does not. Canon 5(A)(3)(d)(ii) was added to the Code when the Minnesota Supreme Court updated its ethical rules and brought them closer to the 1990 version of the ABA Model Code, some twenty-two years after the announce clause was promulgated; and we do not read the two provisions to address the same conduct. The manifestation of bias provision, fairly read, is directed at words and conduct that display personal animus against persons or groups, such as women or minorities. Even if it could be construed to cover announcements about how a candidate would decide cases if elected, settled rules of statutory interpretation require that we decline to read it in this way. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976) (subsequently enacted law cast in general terms should not be interpreted to supplant one dealing with specific subject unless absolutely necessary to give effect to the language). We therefore reject any implication that the adoption of the manifestation of bias provision rendered the announce clause unnecessary.

Wersal also challenges the sufficiency of the evidence the Boards have put forth to justify this speech restriction. He argues that the State did not fulfill its evidentiary obligation as a matter of law because the Boards did not prove there was any concrete evidence showing the harmfulness of candidates announcing their views in the public record before the Minnesota Supreme Court at the time the court adopted the announce clause. This argument misapprehends the Boards' evidentiary burden in this case.

In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 907-08, 145 L. Ed. 2d 886 (2000), for example, the Court stated that to sustain a law setting contribution limits it was enough for the State to adduce evidence substantiating legislative concerns about the actual or perceived corruption associated with large contributions. As we have noted *supra*, the corroborating evidence included a state senator's sworn statement that "large contributions have 'the real capacity to buy votes,'" contemporaneous newspaper accounts tending to show public officials were actually corrupted by contributions, and the recent overwhelming passage of a statewide initiative indicating that the majority of voters had concluded that contribution limits were necessary. *Id.* None of these items were shown to be part of the public record before the legislature at the time the legislature enacted the law.

Burson v. Freeman, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), provides an example of the type of corroborating evidence that can support a speech restriction subject to strict scrutiny. In *Burson*, the Court entertained a challenge to a law establishing a 100-foot "campaign-free" zone around polling places that was designed to protect against voter intimidation and election fraud. As evidence showing that the law was necessary, the Court looked to nineteenth century ballot reforms and traced the development of restrictions on election-day electioneering. *Id.* at 202-05, 112 S. Ct. 1846. It also noted that all fifty States limit access to areas in or around polling places. *Id.* at 206, 112 S. Ct. 1846. Taken together, this evidence revealed a "widespread and time-tested consensus" about the problems of voter intimidation and voter fraud which corroborated the State's conclusion that some sort of "campaign-free" zone around voting compartments was necessary. *Id.*

In this case, the Boards have met their evidentiary burden by offering evidence of widespread and long-standing consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way. Three-quarters of a century ago, the ABA promulgated the nation's earliest formalized standards of professional conduct for judges, the Canons of Judicial Ethics. Canon 30 provided that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support." Canon 30 (1924). Developed and drafted by a committee chaired by Chief Justice William Howard Taft and later approved by delegates to the ABA's 1924 annual meeting, *see* Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 1.02 (3d ed. 2000), the canon reflects the views of members of the legal profession as to what ethical restrictions are needed to protect the integrity of the judiciary. Many state courts reached similar conclusions and adopted the ABA Canons for their own jurisdictions, *id.* at § 1.02 n. 14, including the Minnesota District Judges Association, whose members voted to do so unanimously at a conference in 1950.

In the early 1970s, the ABA committee charged with drafting the Model Code of Judicial Conduct included a restriction on candidate speech similar to the restriction contained in 1924 code. *See* ABA Model Code of Jud. Conduct Canon 7(B)(1)(c) (1972). The ABA's 1972 Model Canon 7 is the pattern on which Minnesota's announce clause is based, and a majority of States that have an elected judiciary promulgated ethical rules prohibiting candidates from announcing their views on disputed legal and political issues. *See* Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 85 (1990). In 1990, when the ABA revised its Model Code, it adopted a different formulation of the candidate speech restriction, but one that continues to restrict more speech than the pledges-and-promises provision. Model Canon 5 restrains candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Jud. Conduct Canon 5(A)(3)(d)(ii) (1990). A number of States have revised their rules in accordance with the 1990 "commitment" canon.[21] Today, most States with an elected judiciary have campaign speech restrictions patterned after either the 1972 or 1990 ABA model canons.[22]

---

[21] *See, e.g.*, Ariz. Sup. Ct. R. 81, Canon 5(B)(1)(d)(ii); Ark. Code of Jud. Conduct Canon 5A(3)(d)(ii); Cal. Code of Jud. Ethics Canon 5(B); Fla. Code of Jud. Conduct Canon 7(A)(3)(d)(ii); Ga. Code of Jud. Conduct Canon 7(B)(1)(c); Ill. Sup. Ct. R. 67, Canon 7(A)(3)(d)(i); Kan. Sup. Ct. R. 601A, Canon 5(A)(3)(d)(ii); Ky. Sup. Ct. R. 4.300, Canon 5(B)(1)(c); La. Code of Jud. Conduct Canon 7(B)(1)(d)(ii); N.Y. Code of Jud. Conduct Canon 5(A)(4)(d)(ii); Ohio Code of Jud. Conduct Canon 7(B)(2)(d); S.D. Stat., ch. 16-2, app., Canon 5(A)(3)(d)(ii); Tenn. Sup. Ct. R. 10, Canon 5(A)(3)(d)(ii); Wash. Code of Jud. Conduct Canon 7(B)(1)(c)(ii).

[22] A few States proscribe only improper campaign pledges and promises. *See, e.g.*, Or. Code of Jud. Conduct JR 4-102(B); Utah Code of Jud. Conduct Canon 5(C)(1). Other States impose different, yet significant speech restrictions. *See, e.g.*, Tex. Code of Jud. Conduct Canon 5(2)(i) (no "indicat[ing] an opinion on any issue that may be subject to judicial interpretation by the [judge/candidate if elected into office], except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case"); Wis. Sup. Ct. R. 60.06(3) (prohibiting "suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power"); *see also* Ala. Canons of Jud. Ethics Canon 7(B)(1)(c) (candidate "shall not announce in advance the candidate's conclusions of law on pending litigation"); Colo. Code of Jud. Conduct Canon 7(B)(1)(c) (candidate may not "announce how the judge would rule on any case or issue that might come before the judge").

Minnesota Supreme Court decisions such as *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939), and *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), also provide insight into factors that would have informed the court's decision to adopt the announce clause. As we have discussed, in both cases Minnesota justices commented on historical problems resulting from close proximity between judicial elections and partisan politics. It is reasonable to infer that the prohibition on candidates announcing their views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary. This inference is corroborated by evidence showing that the Minnesota Bar Association, District Judges Association, and the Conference of Chief Judges recently recommended against the adoption of the less-restrictive 1990 ABA commitment canon because of concerns that liberalizing Canon 5's speech restrictions would politicize judicial elections.

The plaintiffs have offered no contradictory evidence which might increase the need for a more extensive showing by the State. *See Shrink Mo.*, 120 S. Ct. at 906. Wersal argues that the Lawyers Board's refusal to enforce the announce clause calls into question the Boards' attempt to demonstrate that the clause serves compelling state interests. That the Director of the Lawyers Board stated she would not prosecute violations under the clause as a matter of prosecutorial discretion until it was upheld by a court is not sufficient to increase the evidentiary burden. The Lawyers Board's determination was based on the likelihood of a constitutional challenge to the announce clause and the limited resources available to the Board for defending such a suit; it has little bearing on whether certain campaign announcements can impair or be perceived to impair judicial independence and impartiality.

The Lawyers and Judicial Boards have shown that this restriction furthers compelling governmental interests in the independence and actual and perceived impartiality of the judiciary.

B.

Having concluded the restriction furthers compelling interests, we must examine whether it is narrowly tailored. *See California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 2414, 147 L. Ed. 2d 502 (2000); *Brown*, 456 U.S. at 54, 102 S. Ct. 1523.

The district court construed the announce clause to apply only to discussion of a candidate's predisposition on issues likely to come before the candidate if elected into office. *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). None of the plaintiffs claimed in their opening briefs on appeal that the district court erred by interpreting the language as it did. Wersal attempts to raise the issue in his reply brief. It is well established that issues not argued in an opening brief cannot be raised for the first time in a reply brief,[23] and we will therefore analyze the announce clause as it has been construed by the district court. We should add, however, that if the issue were properly before us, we would not find error in the district court's interpretation. The longstanding principle that courts should construe laws to sustain their constitutionality, *see, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), the Minnesota

---

[23] *See, e.g., United States v. Vincent*, 167 F.3d 428, 432 (8th Cir. 1999), *cert. denied*, 528 U.S. 848, 120 S. Ct. 124, 145 L. Ed. 2d 105 (1999); *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); *United States v. Davis*, 52 F.3d 781, 783 (8th Cir. 1995); *French v. Beard*, 993 F.2d 160, 161 (8th Cir. 1993); *see also United States v. Darden*, 70 F.3d 1507, 1549 n. 18 (8th Cir. 1995) ("Absent some reason for failing to [raise issue in opening brief], we will not consider an issue first raised in a reply brief.").

Supreme Court's adherence to this interpretive principle, *see In re R.A.V.*, 464 N.W. 2d 507, 509 (Minn. 1991), *rev'd on other grounds by R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), and the Judicial Board's endorsement of the narrowed construction form a solid foundation for the district court's conclusion. Furthermore, the interpretation accords with *Stretton*, where the Third Circuit interpreted identical language similarly. 944 F.2d at 144.[24]

As construed by the district court, the restriction prohibits candidates only from publicly making known how they would decide issues likely to come before them as judges. A similar construction was determined to be narrowly drawn in *Stretton*, 944 F.2d at 144, and we are persuaded that it is narrowly drawn here as well. These sorts of campaign announcements are (or can appear to be) calculated to show that the candidate will decide cases in a certain way if elected into office, and the implication that the candidate will carry through with his campaign announcements can haunt the candidate on the bench to the detriment of the State's judicial system. *See id. But see Buckley*, 997 F.2d at 229 (questioning whether limiting construction would significantly circumscribe scope of announce clause, giving example of civil war in Yugoslavia as likely to come before courts as persecution defense to deportation).

---

[24] In claiming error, Wersal relies heavily on *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229-30 (7th Cir. 1993) where the Seventh Circuit declined to read an analogous canon narrowly. Having carefully studied both *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991), and *Buckley*, we believe that Stretton is more persuasive. *Buckley* gives little heed to "our task [as courts] to construe [laws] so as to comport with constitutional limitations" if consistent with the will of the lawmaker. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). *Buckley* also distinguished *Stretton* in part due to factors not present in this case or in *Stretton*: a disciplinary body's determination that a judge violated the clause when he commented truthfully on his past record and counsel's convoluted arguments that the announce clause contained an implied "right of reply." 997 F.2d at 229.

Wersal has stated that the restriction prohibits candidates from discussing virtually every topic related to their campaigns, and the dissent maintains that it effectively bans all campaigning. But nothing in Canon 5(A)(3)(d)(i) restricts candidates from discussing or publicizing information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits, and abilities, which are subjects the Minnesota General Assembly has determined to be highly relevant to a candidate's qualification for office. *See* Minn. Stat. § 480B.01, subd. 8 (listing criteria by which commission on judicial selection shall evaluate persons applying for judicial vacancies to be filled by gubernatorial appointment). The Minnesota Supreme Court has also indicated that candidates may discuss and state their views on how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979) (no ethical violation under Canon 7(B), the precursor to Canon 5(A), when candidate made cutting costs of courtroom administration part of campaign platform); *cf. Ackerson v. Kentucky Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 314 (W.D. Ky. 1991) (restraint on campaign speech about court administration would violate First Amendment).

We further believe the Minnesota Supreme Court would conclude that general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause. In 1990 the Judicial Board issued an advisory opinion, which the Board has since made known to judicial candidates by letter, stating that Canon 5 does not prohibit candidates from discussing appellate court decisions. *See* Minnesota Bd. on Judicial Standards, Informal

Op. 10/10/1990. The Judicial Board has also approved extensive lists of sample questions that interested voters could pose to judicial candidates consistent with Canon 5. These questions are wide-ranging and include such topics as a candidate's judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system.

While it is true that some judicial ethics advisory bodies in other States have interpreted language identical to the announce clause to reach topics such as these, *see, e.g., Berger v. Supreme Court*, 598 F. Supp. 69, 74 (S.D. Ohio 1984) (disciplinary counsel's position that truthful criticisms of judicial administration and incumbents prohibited); *see generally*, Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 86-87 (1990) (collecting advisory opinions stating that discussion of court administration, court rules, criminal sentencing, judicial philosophy, published court decisions, etc. were improper), we believe the Minnesota Supreme Court would view the matter consistently with the Judicial Board. The Judicial Board has been intimately involved with the process of amending the Code over the years, and its views are likely to reflect those of the Minnesota Supreme Court. As the Third Circuit in *Stretton* put it, "[w]e would be naive not to recognize that the [Judicial Board's] position is, at the very least, a straw in the wind indicating the direction that [the supreme] court will go." *Stretton*, 944 F.2d at 143. Furthermore, some of the advisory opinions of other States' ethics boards conflict with the Minnesota Supreme Court's decision in *Bundlie* on whether the announce clause prohibits announcements about judicial administration.

Wersal cites several decisions in which courts have struck down similar canons as overly broad restrictions on speech. *E.g., Buckley*, 997 F.2d at 228-29; *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994); *ACLU v. Florida*

Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1990). However, these cases proceed on the assumption that judicial candidates are left with little to discuss and to put before the voters other than their "name, rank, and serial number," *Buckley*, 997 F.2d at 227, "biographical data," *ACLU v. Florida Bar*, 744 F. Supp. at 1098, or "professional history," *J.C.J.D.*, 803 S.W. 2d at 956, and are therefore distinguishable.

The announce clause, as construed by the district court, is narrowly tailored to further compelling governmental interests.

VI.

Wersal contends that Canon 5(B)(2),[25] which prohibits judicial candidates from personally soliciting campaign funds, violates the First Amendment because it is not narrowly tailored.

We have no difficulty in concluding that Canon 5(B)(2) is necessary to serve compelling state interests. Indeed, Wersal does not dispute these points. Raising campaign funds, a practical requirement for judicial candidates who face popular election, has been identified as presenting "the greatest of all conflicts" between necessity and judicial impartiality. *See* E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 98 (ABA 1973). Judges, more than officeholders in other branches of government, risk the appearance that those who contribute to their campaigns can impermissibly influence governmental processes. When judges obtain funds from a group that has an interest in the outcome of litigation, such as the plaintiffs' or defendants' bar, judges can appear beholden to that group for their accession to office, creating the expectation that the judges will favor their benefactors accordingly. *See In re Fadeley*, 310 Or. 548, 802 P.2d 31, 40 (1990) ("A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so."); *cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 905-06, 145 L. Ed. 2d 886 (2000) (public perception that large donors can "call the tune" for candidates can harm democratic processes); *Buckley v. Valeo*, 424 U.S. 1, 27, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam). Even if judges receive contributions from a broad cross-section of persons and interests, the appearance of impropriety hangs over them if they adjudicate cases in which a litigant or counsel has contributed, or refused to contribute, to their campaign. *See Stretton*, 944 F.2d at 145 (noting the unseemliness of judges presiding over cases in which lawyers have helped fund judicial campaign chests).

---

[25] In full, Canon 5(B)(2) provides:

> A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Recognizing the unique difficulties presented by judicial campaign fundraising, Canon 5(B)(2) seeks to insulate judicial candidates from the solicitation and receipt of funds while leaving open ample alternative means for candidates to raise the resources necessary to run their campaigns. To this end, Canon 5(B)(2) provides that candidates may establish campaign committees to conduct fundraising on their behalf. The Code does not limit the amount individuals can contribute to the candidate's campaign fund or the amount the campaign committee may raise. Canon 5(B)(2) imposes only two restrictions related to campaign finance on the committee: its members cannot disclose to the candidate the identity of contributors or those who were solicited to contribute but declined, and they cannot permit the campaign funds to be used for private benefit.

Wersal's objection to this fundraising arrangement is limited: He does not challenge the campaign committee setup or the restrictions placed on the committee's members. Rather, he suggests that a narrowly tailored rule would allow candidates to solicit funds from large groups and to send out letters over their signatures requesting money. He argues that the State's concern over the corrupting influence of money on judicial candidates is fully redressed by the provision that prevents the campaign committee from revealing the identity of campaign contributors.

Wersal is correct that the knowledge-screening provision of Canon 5(B)(2) lessens several of the problems attendant on judicial campaign fundraising; we reject his conclusion, however, that it obviates the need for limitations on candidates soliciting funds from groups personally or by letter. When a judicial candidate seeks funds directly from those who stand to gain from the candidate's decisions in office, the State may conclude that his activity is incongruous with the decorum of judicial office whether or not the candidate is shielded from knowing who ultimately contributed. Particularly when candidates target groups who have pecuniary or ideological interests in litigation likely to come before the court, the mere act of solicitation can contribute to the appearance, accurate or not, that "justice is for sale" and the expectation of impermissible favoritism. *See Fadeley*, 802 P.2d at 40.

Wersal makes a secondary argument that when Canon 5(B)(2) deprives him of the opportunity to solicit funds from large groups or by mail it prevents him from running an effective campaign. The Supreme Court has said that restrictions on campaign financing must leave candidates with the ability to accumulate sufficient resources for effective advocacy. *Shrink Mo.*, 120 S. Ct. at 908-09; *Buckley*, 424 U.S. at 21, 96 S. Ct. 612. Citing the impracticability of his being accompanied by a campaign committee member who could "utter the magic words" to solicit funds, Wersal argues his statewide campaign efforts were frustrated. However, no provision in the Code specifies that members of a campaign committee must request contributions in person. Canon 5(B)(2) expressly permits committees to conduct campaigns through mailings, brochures, and advertisements. Wersal has not alleged that these alternatives are ineffective fundraising mechanisms. Accordingly, he has not demonstrated that Canon 5's restrictions stifled his campaign efforts. *See also Shrink Mo.*, 120 S. Ct. at 909 ("a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*").

In a separate argument, the Party asserts that Canon 5(B)(2) is not narrowly tailored as applied to third parties. Much of this argument is based on a misreading of a Code section we have already clarified. Canon 5(A)(3)(c), which states that candidates "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing," is violated only when persons act as agents of the candidate. As a result, no ethical violations occur if third parties solicit or expend funds independently of Wersal and his campaign committee.

The district court did not err in determining that this restriction is narrowly tailored to further compelling state interests.

VII.

The judgment of the district court is affirmed.

BEAM, Circuit Judge, dissenting.

At the outset, I admit that, insofar as I have been able to discern, Minnesota has a judicial system peopled with individuals of intellect, integrity and character, fully capable of making difficult decisions, consistent with the interests of the people of the state. However, such a condition is beside the point because many other states have achieved the same essential goals without trenching upon clearly established constitutional rights. The court today holds that laws prohibiting candidates for public office from voicing their views as to issues pertinent to their conduct in office, or their opponent's conduct in office, or from appearing or speaking to like-minded citizens, are not only permissible but are apparently necessary to a well-ordered democracy. Because in my view such a result flatly contradicts the edicts of the First Amendment, I respectfully dissent.

The court and I part ways in three critical respects. First, the court misconstrues Minnesota law, reading it with such latitude as to contradict one-hundred fifty years of development in Minnesota's judicial selection processes. Second, the court supplants constitutionally guaranteed rights with its own notions of preferred judicial policy. Finally, the court countenances restrictions on fundamental, protected activity that are neither necessary nor narrowly tailored. In the final analysis, the court sustains a set of restrictions which probably have no practical effects other than to quash election-related speech and association, and thus undermine a democratic process—precisely the fear that prompted the drafting of the First Amendment.

I.

Prior to even contemplating the suppression of otherwise protected First Amendment activity, a state must assert a compelling interest. Presumably, that interest must reflect a state's actual and lawfully adopted policy. The court accepts as "undeniably compelling" appellees assertion that in effecting Canon 5, the Minnesota Supreme Court furthered Minnesota's interest in maintaining the "independence" of its judiciary. *Ante* at 864 [200a]. Certainly, all states share such an interest generally—such is the preferred state of the American judiciary.[26] But different sovereigns give different meanings to the term "independence." I believe the court has misconstrued Minnesota precedent, and in doing so has used it to justify a policy prescription that lacks support in Minnesota's constitutionally established public regimen.

The court, without further analysis, simply accepts appellees' claim that Minnesota has "historically pursued the ideal of an independent judiciary." *Ante* at 865 [202a].

---

[26] The court distorts my views on judicial independence, implying, *ante* at 864 [200a], that I would sacrifice such independence, and, presumably, its alleged by-product, "justice under law," on an altar of "democratic self-government." (I assume the court is referring to my concern for the democratic election process.) The court's statements are seriously at variance with my views and my arguments in dissent. This case is *not* about rules under which a neutral judiciary dispenses justice under canons of ethics designed to support judicial independence, *once the selection process is over*. I wholly agree that such a system should exist and be designed to enhance, through reasonable state regulation, the ideals of judicial independence. This case *is* about the point at which free speech and association collide directly with an attempt by the Minnesota Supreme Court to manage (and I believe over manage) the election process in the name of judicial independence of some definition.

My dissent simply and appropriately recognizes and discusses these competing interests and reaches a result in line with the Constitution and Supreme Court precedent. It is the court that insists that "one of the principles should give way completely to the other," that is, judicial independence, whatever that proves to be under the court's analysis, should trump the First Amendment when the election of a *judge* is at stake. There is absolutely no support in federal law for the court's position.

It relies heavily on the Minnesota Supreme Court's observation in *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), that while the federal and its own system differ, they both "create and maintain an independent judiciary as free from political, economic and social pressure as possible." *Id.* at 420. In this, the court finds license to sustain as consistent with Minnesota public policy anything which it considers to enhance judicial independence. But this latter term is subject to broad and varied interpretations, and merely begs the question "independent from what?" While appointed judges are "independent" from the electorate, elected judges, once elected, are hardly "dependent" on the electors, and are "independent" from other elected officials. However, we are not called upon to sustain our own notions of "independence," but Minnesota's. We must therefore read the Minnesota Supreme Court's statement in *Peterson* in light of that state's public policy as prescribed by its citizens. As it turns out, Minnesotans have consistently rejected all attempts to narrow or curtail their elective franchise when it comes to selecting judges. Rather, they have repeatedly strengthened popular control over their judiciary.

The debate whether to appoint, retain or directly elect judges predates Minnesota's founding. The federal drafters debated it in Philadelphia. *See The Anti-Federalist Papers & the Constitutional Convention Debates* 120-27 (Ralph Ketcham ed., Mentor 1986). Alexander Hamilton defended their subsequent choice in print, arguing that elected judges would suffer "too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws." *The Federalist No. 78*, at 471 (Clinton Rossiter ed. 1961). Anti-Federalists hotly contested that position. Brutus counseled trepidation at the advent of a judiciary "altogether unprecedented in a free country" which was to be "rendered totally independent, both of the people and the legislature." Brutus XI, Letter of January 31, 1788, in Ketcham, *ante*, at 293. *See also*, George Mason, *Speech in Opposition to the Constitution*, and Patrick Henry, *Speech to the Virginia Ratifying Convention*, both in Ketcham, *ante*, at 174, 212 (arguing that the federal judiciary made the courts too far removed from the citizenry).

The federal founders ultimately decided upon lifetime appointments, subject to good behavior, placing us (ostensibly) beyond the cavil of partisan activity and populist suasion. U.S. Const. art. III. As federal judges, we understandably have a bias for this method. Yet, we should not confuse the rationale behind our federal system with some universal judicial *raison d'etre*, for different sovereigns value different policies. Some elect only a few officers and rely largely on appointments, while others insist on electing virtually every office-holder. Since Hamilton and Brutus debated, the arguments on each side have been well known, and were so at Minnesota's founding.

Minnesota's first judiciary arrived under the auspices of the United States with the Northwest Ordinance of 1787, which provided the Northwest Territories with congressionally-appointed judges and governor-appointed local magistrates. Northwest Ordinance §§ 4, 7 (1787); *see generally*, Hiram F. Stevens, *History of the Bench & Bar of Minn.* (1904). In 1849, Congress created the Territory of Minnesota and provided a similarly appointed judiciary. Act of Congress, March 3, 1849 §§ 2, 9, 11, 9 Stat. 403. Minnesotans did not warm to these arrangements. As one state founder noted, "it has been the complaint of the Territory . . . that we have to submit to have our Judges sent to us and have no voice in the selection . . . and [the people] have looked forward with hope to the time when they could elect their own men." *The Debates & Proceedings of the Minn. Constitutional Convention* 495 (1857) ("*Democratic Debates & Proceedings*"). That chance came in 1857 when Congress authorized Minnesotans to draw up a constitution. Act of Congress, Feb. 26, 1857, 11 Stat. 166.

Minnesota chose an interesting time to seek statehood. With the Civil War three years off, and the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856), one year past, any prospective new state necessarily stood in the eye of a hurricane.[27] Against this backdrop, on June 1, 1857, Minnesotans elected delegates to a constitutional convention. One historian gave the following description. "The feeling between and within political parties was bitter. Republicans were not just Republicans but 'Black Republicans' and 'Nigger Lovers.' The Democrats were divided into 'Regular' and 'Moccasin' Democrats, but were united for convention purposes." Julius E. Haycraft, *Territorial Existence & Constitutional Statehood of Minnesota* (1946), republished in 1 Minn. Stat. Ann. 145, 151; *see generally*, William Anderson, *A History of the Constitution of Minnesota* (1921). Moreover, "[s]o intense was the feeling that the Republicans and Democrats would not meet in the same convention. The result was two conventions; delegates of each party held separate sessions in different rooms in the old capitol." Haycraft, *ante*, at 151. The two bodies met separately, largely without consultation. Even after a conference committee produced a compromise document, each convention refused to sign a document soiled by the other's signatures, so each separately signed largely identical documents. *Id.* at 151-52.

The records of these proceedings demonstrate that Minnesota's founders grappled with precisely the same contours as their federal forebears. The Republicans steadfastly insisted on an elected judiciary, but did debate the form of those elections. *Debates & Proceedings of the Constitutional Convention for the Territory of Minn.* 334-35, 402 (1858) ("*Republican Debates & Proceedings*"). The question of politics arose when a Mr. Galbraith proposed an amendment requiring that judicial elections never be held on the same day as an election for any other office. He reasoned that "the excitements of mere political and party issues should be kept as far as possible from the election of the judges—that the people should elect the Judges, upon their merits as judges—that they should be elected with the view of making them as independent of political parties as possible." *Id.* at 406. In opposition, a Mr. Lowe argued, "I do not believe it will be possible to separate the election of judges from political considerations." *Id.* The convention rejected Galbraith's amendment, and opted for concurrent judicial elections.

---

[27] Abolitionist sentiment ran high in Minnesota and, while not reaching the levels in other states, did result in some violence. Interestingly, among the slaves brought to Minnesota during the pre-civil war period was Dred Scott, who from 1835-40 lived with his "owner," Surgeon J. Emerson, at Fort Snelling. Stevens, *ante*, at 30-36.

The Democratic convention proved far more contentious. After a committee failed to agree on a judicial selection method, the issue came to the convention floor. *Democratic Debates & Proceedings, ante*, at 493-509. Those favoring the Hamiltonian appointment model did so for two reasons, fear of populism and fear of political entanglement.

First, they feared the populism that might result from an elected judiciary. One vigorous opponent, a Mr. Setzer, argued:

> The great object of an appointed Judiciary, is to secure stability upon the part of the government, by having a power within the State conservative enough to restrain the waves of popular excitement, when they sweep over us as they have done in different States for years past. . . . Judges represent no constituency and are elected by no constituency. They represent nothing except the abstract ideas of equity and justice.

Id. at 495-96. The "abstract ideas of equity and justice" heralded were those set out in *Dred Scott*—the culmination of the grand experiment that seventy years earlier Brutus had observed was "altogether unprecedented in a free country." And the "waves of popular excitement" that so rankled delegates were the popular sentiments of radical abolitionist fervor. He continued, "[w]e see it in Wisconsin, in Iowa, and in all those States where popular excitement in reference to negro-worship and disunion has had its effect upon an elective Judiciary." *Id.*

Minnesota's founding debate did not turn entirely on slavery. Those opposed to an elected judiciary also raised precisely the same, eminently sensible concerns troubling the court today. Another delegate, a Mr. Meeker, argued:

> I contend that the Judges who are elected, are elected by parties, and are the mere fuglemen of caucuses. The best trickster or the best manager of caucuses is just as likely to be the nominee of a party as the most learned man in the nation. . . . [T]he greatest curse that could befal [sic] any people would be the establishment of a political court . . . . [A]nd our Judges . . . if they are to be elected, must necessarily be essentially political Judges; they cannot be anything else.

Id. at 500. They feared the instability such a system would create. "Whichever party is in the ascendancy will change the system of jurisprudence to its own standard, and there will be no security, no stability in anything." *Id.* at 501. Accordingly, a Mr. Sherburne recommended adopting the venerable appointment mechanisms common along the east coast. *Id.* at 497.

The prevailing delegates, those favoring judicial elections, met these arguments head-on. Said a Mr. Emmett:

> We hear a great deal of talk about an independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of

> what? Independent of the people . . . ? I say then that in order to correct the errors of Judges—and it may be important to correct them,—the office should be made elective.

Id. at 503. And as regards the fear that politics would infect an elected system, he continued, "if the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges . . . . The governor always selects men belonging to his own political party, while the people often select them regardless of parties." *Id.* A Mr. Curtis responded to Mr. Sherburne: "[I]s a sufficient argument in favor of an appointed Judiciary, that it is old? Is it all that can be said in its favor, that it has grown hoary by age and usurpation—because it is all covered over from one end to the other by corruption and fraud?" *Id.* at 498.

As these exchanges demonstrate, the arguments surrounding election and appointment were well known and well met. Despite the concerns raised then and marshaled again by the court today, Minnesotans of both parties opted for an elected judiciary. Ultimately, they more feared the potential politics of an appointed bench and saw popular election as the proper remedy. Given the political climate, they desired more control over their judiciary. *That was the policy adopted by the people of Minnesota.*

Minnesota's electorate has never since intimated a change in this policy. Indeed, it has frequently reaffirmed judicial accountability to the electorate.[28] In 1912, for instance, the legislature required judicial candidates to run on a non-partisan ballot. *Peterson*, 490 N.W.2d at 420. That statute in no way restricted a candidate's political activities or ability to educate the voters as to his merits, opinions or values. *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579, 580-81 (1939). The reform's objective was to ensure that candidates were elected on their own merits. *Id.* at 580. A merit-based election necessitates the flow of information regarding candidates to the electorate.

---

[28] Minnesota courts have consistently struck down rules depriving judicial offices of their elective nature. *See State ex rel La Jesse v. Meisinger*, 258 Minn. 297, 103 N.W.2d 864, 866 (1960); *State ex rel Smallwood v. Windom*, 131 Minn. 401, 155 N.W. 629, 633 (1915); *State ex rel Roseckes v. Dreger*, 97 Minn. 221, 106 N.W. 904, 906 (1906); *State ex rel Jordan v. Bailey*, 37 Minn. 174, 33 N.W. 778, 779 (1887).

Minnesota has four times rejected the so-called Missouri Plan, whereby the governor could fill vacancies by non-partisan appointment, and such appointees would later be subject only to a retention vote. Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minn. Constitution*, 40 Minn. L. Rev. 815, 815-19 (1955-56); *Peterson*, 490 N.W.2d at 421 n. 14. Again, voters retained their system of direct electoral control.

In 1948, a commission recommended that candidates run against a specific incumbent rather than against the field. *Peterson*, 490 N.W.2d at 421 n. 14. It argued, "[w]here several incumbents are running for re-election, each should stand or fall on the basis of his own record. The present system does not permit this since opposing candidates run against the field." *Report of the Constitutional Comm'n of Minn.* 43-44 (Oct. 1, 1948). Minnesota law was amended accordingly. See 14A Minn. Stat. Ann. § 204B.06; *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950) (sustaining requirement that judicial candidates declare which specific seat is sought). Such seat-specific elections increase the electorate's focus on a specific judge's conduct.

Thus, since first permitted to select its own judiciary, Minnesota has consistently favored electorally-responsive judges. Its citizens have considered and rejected the court's policy concerns,[29] and have rejected appointment and retention systems that would have curtailed or eliminated popular control. Minnesota has repeatedly affirmed its citizens' right to elect their judges, and has bolstered that franchise with laws enhancing merit-based elections and furthering the flow of information regarding the candidates to the electorate.[30] Canon 5 subverts this policy. The suppression of election-related speech and association does not enhance the franchise. In fact, it militates against the public's ability to elect judges based on their merits by denying citizens a reasonable vehicle for self-information. The court assures that candidates may still discuss their "character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits and abilities." *Ante* at 882 [233a]. However, these are simply not all of the qualities that piqued the interest of Minnesota's founders, nor those which fully inform voters who are charged with the selection of Minnesota's judiciary.

---

[29] Indeed, the Minnesota Supreme Court specifically refused to resurrect the policy debates undergone at the constitutional convention.

> There are many arguments, on grounds of both principle and expediency, against the election of judges, either in special cases or generally. Such arguments do not enter into our consideration. The fundamental law of this state is, and always has been, that the selection of judges must be submitted to the electors.

La Jesse, 103 N.W.2d at 866.

[30] The court attempts to divorce my review of Minnesota judiciary history from that undertaken by the Minnesota Supreme Court in *Peterson*, and paints the latter as justifying its conclusion today. *Ante* at 866 [204a] n. 13. But the review undertaken in *Peterson* supported a regulation wholly different from that before us today. In *Peterson*, the Minnesota Supreme Court reconciled Minnesota history with a measure requiring the judicial election ballot to designate incumbent jurists as such. 490 N.W.2d at 424. The Minnesota Court found that initiative consistent with Minnesota history and sustained it because it *enhanced* the flow of information to Minnesota voters, which stands in stark contrast to the measure before us today which *suppresses* that same flow of information. Rather than address what the Minnesota Supreme Court meant by "independent" in the proper context, the court simply transports the Minnesota court's purposely cabined conclusions into today's opinion. But as my review, and that undertaken in *Peterson* indicate, in the context of Minnesota public policy, an "independent judiciary" means judges elected by well-informed, independent voters. In undermining that process by stifling the free flow of information, the court merely exacerbates the partial transfer of the Minnesota judicial selection machinery into the hands of other narrow political influences as noted elsewhere in this dissent.

The question here is whether Minnesota has expressed a sufficiently fundamental policy interest in "independent" judicial elections to even warrant our proceeding to the next stage of our constitutional inquiry. Certainly, in *Peterson*, the Minnesota Supreme Court instructed us that Minnesota has an interest in making its judiciary as independent "as possible." 490 N.W.2d at 420. But as the Minnesota Supreme Court cannot trump its citizens' prescribed policy, "as possible" cannot be read to include restrictions which curtail the elective franchise. Because Canon 5 does precisely that, I believe the court has clearly misapplied Minnesota law.

II.

The preceding discussion may prove largely academic, because the restrictions at issue in this case were not enacted by the Minnesota legislature but rather were created by the Minnesota Supreme Court itself. While that court has not yet ruled that its own regulations comport with fundamental state policy, it could just as easily do so. And as a federal court, we defer to state courts on questions of state law. Indeed, we wade into such questions only in the most dire of circumstances, for instance where state law is being intentionally tortured to discriminate against a protected minority, *see, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), or where an error of state law works a singular national impact, *see, e.g., Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). But while we ought not inject ourselves into the state law question, we are charged with enforcing federal law. Federal law, and in particular the Constitution, operate to protect the rights of citizens against encroachment by both federal and state governments. In my view, even accepting arguendo that the people of Minnesota did actually intend to immunize their judicial candidates from some of the rigors of an election campaign, Canon 5 still flatly contradicts controlling precedent and violates the Constitution.

The court repeatedly emphasizes the importance of judicial independence, a proposition with which I heartily agree. Judicial independence is of the utmost importance to a fair and well-functioning judicial system. Moreover, I agree that a state has an interest not only in warding off an actual breakdown of that independence, but also the appearance of such. Every court to address this or a similar question has recognized the importance of this principle. Moreover, all have recognized, again rightly so, that by virtue of their function, judges fundamentally differ from other elected officials. The court cites extensively to these authorities. Yet the court omits noting that almost all of these courts have then further recognized that such policy notions cannot trump constitutionally-enshrined rights.[31]

---

[31] *See e.g., Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (striking down restrictions on judicial campaign spending); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (striking down "announce" clause); *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991) (narrowing construction of "announce clause"); *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000) (striking down canon restricting advertising and election speech); *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224 (M.D. Ala. 2000) (restraining enforcement of campaign advertisement and conduct restrictions); *ACLU of Florida v. The*

The Constitution makes strict demands. Often times, important and justifiable public policy goals must bow before its restraints. As judges, we must put aside our inclinations as jurists, lawyers, residents, citizens, and parents, and enforce the Constitution's restraints. The Constitution protects the most basic elements of our democratic processes, in particular the rights of candidates and citizens to express and receive views pertinent to public office, and to associate in the election context with others of their own choosing. Because Canon 5 sharply curtails, if not outright bans these activities, regardless of how laudable its purpose, it must be struck down.

Because election speech and association lie at the heart of the First Amendment, any restriction thereof must survive strict scrutiny. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). A restriction on otherwise protected activity must be necessary and narrowly tailored to serve a compelling state interest. *Id.* at 222, 109 S. Ct. 1013. "[I]t is the rare case in which . . . a law survives strict scrutiny," *Burson v. Freeman*, 504 U.S. 191, 211, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), yet the court today, with little reservation, affirms a set of restrictions more sweeping in scope and effect than ever adopted elsewhere. I discuss in turn, the First Amendment rights implicated by the court's decision, the court's purported interests and the need for and tailoring of the challenged restrictions.

A.

The Supreme Court has consistently afforded election speech and association the highest protection. "The free ex-

---

Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990) (enjoining "announce" canon); *In re Chmura*, 461 Mich. 517, 608 N.W. 2d 31 (narrowing canon to prohibit only knowingly false statements), *cert. denied*, [531 U.S. 828], 121 S. Ct. 77, 148 L. Ed. 2d 40 (2000); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991) (striking down "announce" and other campaign restrictions).

change of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign." *Brown v. Hartlage*, 456 U.S. 45, 53, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982). Few, if any, state interests prove sufficiently compelling to trump these activities. While "a state has a legitimate interest in upholding the integrity of their electoral process . . . , when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated." *Id.* at 52, 102 S. Ct. 1523. Canon 5 runs roughshod over the clearly established speech and associational rights of candidates, political parties and the voting public. That alone should foreclose any thought of Canon 5's constitutionality.

Candidates for public office enjoy both speech and associational rights.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. *Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known* so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. Valeo, 424 U.S. 1, 52-53, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (emphasis added). To that end, the First Amendment protects the right to campaign and restricts states to preventing only actual fraud and corruption.[32] *Brown*, 456 U.S. at 55, 102 S. Ct. 1523.

---

[32] The court cites *Burson* where the Supreme Court sustained the prohibition of "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place." 504 U.S. at 193, 112 S. Ct. 1846. While not a traditional

Candidates similarly enjoy protected association rights. These interpose themselves "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986). A candidate's association with a political party, organization or another candidate provides a basic means of election communication. Associational rights work hand in hand with a candidate's speech rights, for without the former, the latter may prove meaningless. "'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'" *Id.* at 214, 107 S. Ct. 544 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973)).

The First Amendment protects not only speakers' rights, but also those of listeners. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). A campaign implicates not only the candidate's right to self-expression, but also voters' rights to receive the candidate's message. A state may not "hamstring [ ] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223, 109 S. Ct. 1013. Nor may a state limit public debate as "[i]t is simply not the function of government to 'select which issues are worth discussing or debating.'" *Brown*, 456 U.S. at 60, 102 S. Ct. 1523 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)); *accord United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865

"time, place, and manner" restriction in that it was content-specific, the rule curtailed speech only within that 100-foot bubble. *Id.* at 197, 112 S. Ct. 1846. Against a vast history of election fraud and intimidation at polling places, the Court permitted only an extremely narrow, location-specific restriction on campaign speech. *Burson* hardly supports the absolute bans imposed by Canon 5.

(2000). In short, "[a] state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U.S. at 228, 109 S. Ct. 1013 (quotation omitted).

Voters' associational rights parallel their right to receive information. "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220, 107 S. Ct. 544.

A party's speech and association also receive protection, particularly in the election context. *Eu*, 489 U.S. at 224, 109 S. Ct. 1013; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). In endorsing or inviting a candidate to speak, a party "reflects its members' views about the philosophical and governmental matters that bind them together [and] seeks to convince others to join those members in a practical democratic task," an election. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996) (plurality opinion of Justice Breyer). Limitations on a party's ability to endorse a candidate "hamper[ ] the ability of a party to spread its message." *Eu*, 489 U.S. at 223, 109 S. Ct. 1013. "[A] political party has a right to . . . select a standard bearer who best represents the party's ideologies and preferences." *Id.* at 224, 109 S. Ct. 1013 (citations and quotations omitted). The suppression of a party's right to associate with candidates of its choice, renders it powerless.[33] "The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." *Tashjian*, 479 U.S. at 214, 107 S. Ct. 544.

---

[33] The court relies in part on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), in which the Court sustained a ban on fusion candidates—those appearing on the ballot as representing more than one party. That law

Canon 5 trenches upon these rights in a variety of ways. The "announce" clause, for instance, effectively bans campaigning itself. The court disagrees, saying "[t]he judicial candidate simply does not have a First Amendment right to promise to abuse his office." *Ante* at 862 [197a]. But the court proves too much. The Supreme Court established in *Brown* that no candidate for any office possesses such a right. "[T]he state may ban such illegal agreements without trenching on any right ... protected by the First Amendment." 456 U.S. at 55, 102 S. Ct. 1523. Beyond prohibiting fraud and corruption, and the appearance of the same, a state may prevent judicial candidates from prejudging or pledging outcomes in specific cases or even in particular types of cases. But beyond such, a state cannot further unreasonably curtail election-related speech.

The announce clause, however, bars discussion of *all* disputed legal and political issues. The court's narrowing construction to "issues likely to come before the candidate," *ante* at 881, is meaningless. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (recognizing the true scope of such a "limitation").[34] Even could such a

---

governed form of the ballot but did not restrict parties from endorsing the candidate of their choice. This prevented small parties from bootstrapping their way into public election funds by endorsing a major party candidate, and then claiming the resulting votes. As it did not affect candidate or party speech and associational rights, the Court sustained the rule. That case does not support the banning of all election-related discussion and association.

[34] Construing similar language, similarly curtailed, Judge Posner noted:

> There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground

category be properly cabined, it would still roam far beyond the narrow category of speech left unprotected by the Court in *Brown*. The court assures us, for instance, that a candidate may discuss his "judicial philosophy." *Ante* at 882 [234a]. I cannot fathom "disputed legal issues" more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process. Yet are these not captured by the term "judicial philosophy?" The term is as sweeping as the court's allegedly narrow construction.[35]

Along with the announce clause, the restrictions on attending and speaking at party gatherings, and the bans on seeking or using endorsements, and on self-identifying as a party member similarly tread upon protected First Amendment rights. Obviously, by banning such activities, Canon 5 directly impacts the rights of judicial candidates. The court insists that this impact goes no further, that Canon 5 affects only the rights of candidates, and not those of any third parties. *Ante* at 873-75 [217a-220a]. But this cannot be, as laws that affect candidates necessarily affect voters. *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972). The court strives mightily to justify the impact wrought on candidates' rights, arguing for instance that judicial candidates have less interest in certain

---

> that they face persecution . . . ; and some years ago the Illinois courts were embroiled in a custody fight involving a child who didn't want to return to the then Soviet Union with his Soviet parents.

Buckley, 997 F.2d at 229.

[35] To truly grasp the impact of today's opinion, one must consider the plight of the judicial candidate who in 2002 must decipher Minnesota ethical obligations. Between them, Canon 5, the district court's opinion and the court's opinion today supply three different versions of acceptable speech. Moreover, all three remain contingent on the Minnesota Supreme Court's agreeing with the court's construction, for if it does not, the judicial candidate may still face sanctions. The threat of chilled speech is too great to countenance.

types of policy debate than do other types of candidates. *Ante* at 862 [196a]. Such arguments do little to justify collateral effects on the rights of others.[36]

Canon 5 affects third parties in a variety of ways. For instance, the announce clause curtails voters' rights to hear a candidate's views on those issues most pertinent to future conduct in office. By preventing candidates from seeking endorsements, Canon 5 potentially prevents voters and parties from gauging a candidate's attitude towards a party, something central to many voters' decision-making processes. Despite the court's protestations, it also de facto curtails a party's ability to endorse the candidate of its choosing. Parties are unlikely to endorse their preferred candidate so long as they fear handing an opponent a potential election issue—specifically, the specter of an ethics violation—even if none exists. This in turn curtails voters' rights to hear parties' views as to candidates. Additionally, by preventing candidates from attending or speaking at party gatherings, Canon 5 trenches upon parties' rights to express themselves in the manner of their own choosing, specifically by presenting the candidate of their choice.

Our First Amendment rulings usually parse the hypothetical. We worry about "potential" chilled speech, and the supposed ill effects that might flow from quashed association. Presented only with the text of Canon 5, one might well hypothesize that restricting candidates' abilities to express their views and to associate with political parties would lead to two results: higher rates of incumbent retention; and disproportionate campaign fund-raising. This hypothesis follows from a rudimentary understanding of public campaigns and the judiciary.

---

[36] Of course, the court belies its own contention with the argument, addressed *infra*, that political parties work a unique effect upon the electoral scheme. *Ante* at 872-73 [215a-217a], 876-77 [222a-225a]. How the court reconciles its concern with party involvement with its assurances that the rights of candidates alone are affected escapes me.

Campaigns for public office, judicial, legislative or executive, necessarily favor incumbents. Incumbents have better name recognition, better resources, are usually better staffed, and barring some recent disaster, are afforded the presumptions of experience and competence. Of the three branches of government, the judiciary seems to least capture the public's attention. Judicial incumbents, therefore, may enjoy these benefits to an even greater extent.

Unlike most of our First Amendment cases, however, this case need not stick to the hypothetical. Canon 5 has been in effect in Minnesota for some time, in varying forms. We therefore can look to recent elections to see whether these supposed harms have come to pass. Minnesota is no exception to the rule that the public pays the least attention to the judiciary. Indeed, one Minnesota Supreme Court Justice has observed of judicial elections that "it's pretty darn hard to get people to care." *Amendment of Canon 5 of the Code of Judicial Conduct: Hearing Before the Minn. Supreme Court 44* (1997). Election statistics bear this out. In 1996 one-half million voters cast a ballot in the Presidential race yet did not vote in the Supreme Court race. League of Women Voters of Minnesota, *Choosing Minnesota's Judges: An Examination of the Present System and Alternative Proposals* 6 (1998). Moreover, 86% of responding voters said they needed more information about judicial elections and 77% observed they got less information about judicial than other elections. *Id.*

Fund-raising and other election data demonstrate disturbing distortions in a supposedly democratic process.[37]

---

[37] Prior to every Supreme Court election, the Minnesota State Bar Association holds a plebiscite between the candidates among its members. The results display in dramatic fashion the extent to which an incumbent may count on support from groups most vested

During the 2000 election cycle, of those judges up for election, only five of sixty-seven trial court benches were contested and only one of four appeals court judges faced a challenger. In 1998, only ten of eighty-nine trial court benches were contested.[38] Judicial fund-raising reflects the same bias. In the 2000 election, the four incumbent Supreme Court justices seeking re-election raised a combined $505,070.63. Of their opponents, only two raised sufficient funds to warrant disclosure. These two together raised only $23,582.67. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2000). A stable judiciary is, on balance, a laudable pursuit and perhaps Minnesotans have no cause to find fault with any of their judges. But it is just as likely that, at least in part, these imbalances flow from a lack of information resulting from the suppression of election-related speech and association and from other impediments inherent in Canon 5.

Not surprisingly then, in recent history prior to the 1998 election which spawned this suit, only two incumbent judges had lost elections. *See* Mary Ellen Egan, *Judging for Himself*, City Pages 4-5 (June 17, 1998). The record details appellant Wersal's campaign difficulties, hamstrung by both fund-raising and speech limitations. Indeed, an ethics complaint forced him out of the 1996 campaign for fear of losing

---

in the judiciary. Since 1974, incumbents have out-polled their challengers by the following margins: 1974: 91% to 9% and 85% to 15%; 1978: 77% to 23% and 95% to 5%; 1982: 95% to 5%; 1992: 61% to 39% and 85% to 15%; 1996: 75% to 25% and 90% to 10%. Minnesota State Bar Ass'n, *Judicial Elections Task Force Report & Recommendations* 32 Appendix D (1997). While this case has been pending, the 2000 election cycle has come and gone. I occasionally use the most recent data, which postdates the record on appeal.

[38] These numbers reflect a consistent trend. Since 1980, the number of contested trial benches of those facing election were as follows: 2 of 25; 0 of 25; 5 of 56; 9 of 54; 2 of 67; 4 of 93; 5 of 82; 6 of 42; 14 of 111. Minnesota State Bar Ass'n, *Judicial Elections Task Force Report & Recommendations* 7 (1997).

his law license and being unable to support his family. Another Supreme Court candidate, Michael Demoss, faced a similar problem after making comments about his views on abortion. With challengers unable to create traction by discussing actual issues, or to raise funds, the results in judicial elections are hardly surprising.

Minnesota's judicial elections thus reveal the precise results one might suspect Canon 5 would produce. Moreover, its chilling effects on electoral activity are precisely those which spurred the First Amendment. It might be naive to argue that incumbents must never be permitted to use their offices to bolster their own positions—such conduct seems inimical to politics generally. But American tradition has long recognized that the best defense against such conduct is the right of a people to freely associate, assemble and speak. It may be, as a matter of policy, that an appointed judiciary best protects our liberties. I certainly think so, and the court obviously agrees. But Minnesota has made a different choice, and having chosen an elective selection method it cannot then turn around and quash candidates' constitutionally guaranteed rights. The upshot is this: when a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association. Certainly, a state may regulate corruption as in *Brown*, the integrity of the voting process as in *Burson* and the form of its ballot as in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). But the state may not unduly curtail speech and association, for they are too central to First Amendment interests in the election process.

B.

The court does not discuss the foregoing authorities. Rather, it tries to sidestep this entire doctrinal inconvenience with a simple argument—that judges are different. It surmises that given the nature of their office, judges, even when elected, warrant different treatment under the First

Amendment.[39] The court identifies three interests, all under the rubric of enhancing judicial independence, which it deems sufficiently compelling to warrant the suppression of fundamental rights: safeguarding a judge's ability to apply the law neutrally; maintaining the public confidence in judicial impartiality; and insulating judges from political pressure. *Ante* at 864 [200a], 867 [205a-206a]. Many courts have noted, and I agree, that judges differ from other officials. As a matter of constitutional law, however, the judiciary has no more or less right than any other coordinate branch to insulate itself from the rigors of public debate, particularly in the election context. The court embarks on a path long since foreclosed, as the Supreme Court has directly and pointedly refused to permit such specialized treatment, even given the court's stated concerns.

The judiciary may not rely on the "maintenance of confidence in the judicial system," essentially the interest advanced by the court today, as a justification for the suppression of protected expression. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 833, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978). In *Landmark Communications*, Virginia attempted to rely on this interest to justify a statute making it a misdemeanor to report on confidential judicial disciplinary proceedings.[40] *Id.* Recognizing that "the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions," the Court ruled "neither the Commonwealth's interest in protecting the reputation of its judges, *nor its interest in maintaining the institutional integrity of its courts* is sufficient to justify the subsequent punishment of speech at issue here." *Id.* at 839, 841, 98 S. Ct. 1535 (quotation omitted, emphasis supplied). "[I]njury to official reputation is an insufficient reason for repressing speech that would otherwise be free [and] *the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.*" *Id.* at 841-42, 98 S. Ct. 1535 (quotation omitted, emphasis supplied).

---

[39] The court dallies briefly with an analogy between judges and civil servants, drawing heavily on *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). There, the Court found compelling the interests of forging a civil service capable of enforcing laws without regard to party allegiances, and in avoiding the appearance of bias among federal employees in order to maintain the public confidence. *Id.* at 565, 93 S. Ct. 2880. The analogy fails. Offices are made elective rather than appointive in order to introduce a degree of public control. Given the discretion that judges wield, that voters would desire such control is hardly surprising. The state's interests in these two areas are quite divergent.

Landmark Communications extended a well-established body of precedent forbidding judicial efforts at self-isolation from public debate. Potential "disrespect for the judiciary" and worries of the "disorderly and unfair administration of justice" cannot compel the suppression of protected expression. *Bridges v. California*, 314 U.S. 252, 270, 62 S. Ct. 190, 86 L. Ed. 192 (1941). In *Bridges*, the Court prevented a trial court from silencing newspaper editorial criticism of its conduct during ongoing legal proceedings, because:

---

[40] The court may seek to cabin *Landmark Communications* as merely preventing the criminalization of speech whereas this case regards an administrative or professional sanction. The statute in *Landmark Communications* made the challenged conduct a misdemeanor and subjected the paper to a $500 fine. While criminal in form, the actual harm in that case was much less severe than the threat judicial candidates face in Minnesota. Failure to abide by ethical canons can subject a lawyer or a judge to sanction, removal or disbarment. In terms of gravity, the restrictions at issue here pose much the greater danger. *See In Re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978) (holding that a state's interest in effective judicial administration must bend before an attorney's First Amendment rights).

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion .... [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt, much more than it would enhance respect.

Id. at 270-71, 62 S. Ct. 190.

This argument grows all the stronger in the election context. In *Wood v. Georgia*, 370 U.S. 375, 379-80, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962), the Court reversed a contempt order issued against a sheriff who told a grand jury that he opposed its having been empaneled. The state argued such conduct constituted a "clear and present danger" to the administration of justice. *Id.* at 387, 82 S. Ct. 1364. However, both the sheriff and the judges involved were elected officials charged with public responsibilities. *Id.* at 390, 395, 82 S. Ct. 1364. The sheriff, therefore, "had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 394-95, 82 S. Ct. 1364 (citation omitted); *see also, Craig v. Harney*, 331 U.S. 367, 370, 376-77, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947) ("Judges are supposed to be men of fortitude, able to thrive in a hardy climate.... Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected."); *Pennekamp v. Florida*, 328 U.S. 331, 336-40, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946) (rejecting a "threat to the impartial and orderly administration of justice" as justification for a contempt order stemming from a political cartoon); *accord Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (holding that without good cause, criminal trials must be open to the public); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (affirming principle of judicial transparency).

The First Amendment therefore forecloses the use of criminal or contempt sanctions to suppress criticism of the judiciary. The use of punishing civil and professional sanctions to accomplish the same end is equally offensive. I see little difference between truthful criticisms leveled at a judge by a newspaper editor or elected official on one hand, and a judicial candidate on the other.[41] I similarly see little difference between the use of the contempt power, and the use of a Supreme Court's ability to regulate bench and bar, to silence judicial criticism. Judges, elected or otherwise, are thought to be citizens of honor, integrity and fortitude. By holding office they subject themselves to public criticism.[42] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971). And as elected officers, this holds doubly so for Minnesota's judiciary. A judicial candidate has a right to criticize the opinions, philosophies, rulings and public statements of the incumbent, who has a concomitant right to respond in kind. In sustaining Canon 5, the court permits precisely what these precedents say may not be done, except that rather than only protecting judges from the speech of others, they are apparently designed, according to the court, to protect incumbent judges and judicial candidates from the effects of their own speech. Such paternalistic notions have long been suspect, and are patently unconstitutional. Even granting the court's contention that Canon 5 will prevent some undesirable conduct, the vast majority of the speech and association suppressed will be legitimate, wholesome, democratic activity. Contrary to the court's assumption, judges, in this context, are not different. In the eyes of the First Amendment, they are the same.[43]

---

[41] The court argues that Minnesota "seeks not to shield judges from published criticism, but to prevent them from deserving such criticism." *Ante* at 867 [206a] n. 14 (citations and quotations omitted). But the court's cure kills the patient. The worry, presumably, is that candidates will do or say things that pledge or seem to pledge them to certain outcomes in return for support, thus threatening judicial impartiality. The cure is to ensure that candidates can do nothing at all, thus destroying the election Canon 5 set out to save. Whether the court likes it or not, facing public criticism, whatever the source, comes with being a public official. Moreover, it is most certainly part of being a public candidate. This regulation flies in the face of both.

[42] Couching these prohibitions as necessary professional regulations falls similarly short, for the Supreme Court has repeatedly favored First Amendment expression over professional ethical regulations. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).

C.

I turn finally to the more mundane application of the Supreme Court's strict scrutiny jurisprudence. Even accepting that a restriction may serve a compelling state interest, in order to warrant the suppression of otherwise protected speech and association, it must be necessary to achieve its purpose. *Burson*, 504 U.S. at 198, 112 S. Ct. 1846. Despite the court's best efforts, Canon 5 fails this test.

Because a regulation that does not achieve its stated end cannot be necessary, the touchstone of necessity is effectiveness. *Eu*, 489 U.S. at 228-29, 109 S. Ct. 1013; *Tashjian*,

---

[43] To bolster its "judges are different" argument, the court relies in part on *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), where the Court reviewed a statute prohibiting the picketing of a courthouse with the intent to influence a judge, juror or court officer in the course of his duties. *Id.* at 560, 85 S. Ct. 476. The Court reversed the conviction on the grounds that an official had misrepresented to the defendant that his protesting was legal. *Id.* at 569-70, 85 S. Ct. 476. Despite this holding, the court engaged in a lengthy dictum discussing the statute itself. The statute, the Court observed, regulated only conduct, and did not infringe upon speech or assembly at all. *Id.* at 563, 85 S. Ct. 476.

479 U.S. at 214, 107 S. Ct. 544. For instance, in *Eu*, the state argued that its ban on political party endorsements of primary candidates served the compelling interest of protecting primary voters from confusion and undue influence. *Eu*, 489 U.S. at 228, 109 S. Ct. 1013. The Court doubted whether the restriction could achieve its stated rationale because of all the organizations with an interest in primary elections, the ban silenced only political parties. *Id.* at 228 n. 18, 109 S. Ct. 1013. Many other equally or more vocal groups remained free to endorse whomsoever they wished. Moreover, "the growing number of endorsements by political organizations using the labels 'Democratic' or 'Republican' has likely misled voters into believing that the official governing bodies were supporting the candidates." *Id.* As the restriction did not effect its goal, it was not necessary.[11]

Canon 5 suffers from precisely this same flaw. It bars judicial candidates from attending or speaking at "political organization gatherings" or from seeking, accepting or using endorsements from a "political organization," and defines a "political organization" as a "political party organization." Canon 5 purports to safeguard a judge's ability to apply the law neutrally, to maintain the public confidence in judicial impartiality and to insulate judges from public pressure. Given its restricted application, however, Canon 5 simply cannot achieve these goals.

---

[11] Ordinarily lawmakers may address problems piecemeal rather than having to propose all-encompassing solutions. Indeed, permitting "over-inclusiveness" and "under-inclusiveness" underpins basic rationality review. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Such is not the case regarding fundamental rights, however, where we enforce a much higher standard. *Playboy*, 120 S. Ct. at 1888. Here, failure to solve the entire asserted problem is fatal. *See, e.g., 44 Liquormart*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (Opinion of Stevens, J.); *Discovery Network*, 507 U.S. at 418, 113 S. Ct. 1505. Strict scrutiny imposes a much heavier burden on Canon 5 than on the "time, place and manner" restrictions reviewed in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 470-71 (8th Cir. 1991).

The court worries that by appearing at, speaking to or being endorsed by a political party, a candidate will appear "in hoc" thereto. As a general proposition, this is simply wrong. The Supreme Court recognized in *Eu* that one cannot conclude from such conduct that a candidate will necessarily tow a party line. 489 U.S. at 225 n. 15, 109 S. Ct. 1013. But even accepting the court's premise, Canon 5 falls far short of its goals because it fails to include candidate appearances before, speeches to, or endorsements by other politically active organizations. Candidates remain free to consort with organizations such as the National Organization of Women, the NAACP, the Christian Coalition, the National Association of Manufacturers, the AFL-CIO or the NRA. Many of these organizations are implicitly, and some explicitly, aligned with one or another of the major parties.[6] Candidates remain free to seek and use the endorsements of the insurance lobby, the Minnesota Trial Lawyers Association, or any other political or quasi-political organization not organized as a "political party." If the court's "appearance" concerns are valid, this ought to cause it grave anxiety.

The court argues that political parties are more likely to command a candidate's acquiescence to party positions on the bench. *Ante* at 872-73 [215a-217a], 876 [221a-222a]. Were this true, the court's argument would still fail because one does not satisfy the necessity requirement merely by solving for the greatest influence, but rather by addressing all significant influences. The court's assertion, however, is untrue. Of all the politically-oriented organizations around, the two major parties are both "big-tent" organizations—

---

[6] Indeed, statistics from the 2000 election indicate that NAACP members voted for democratic candidates at a *higher* rate than did members of the democratic party.

ideologically consistent only in their aggregate distinctions one from another. Within each party a variety of opinions on most issues may be found. A candidate's appearance at a party function hardly indicates endorsement of its views. (I am certain that Republicans everywhere will be either delighted or dismayed to know that Ralph Nader's appearance at their national convention last fall signified his support for their platform. *See* Eun-Kyung Kim, *Nader Addresses Youth Convention*, *AP Online*, WL 24553132 (August 2, 2000).) A speech at a party function supports nothing beyond the candidate's own words, and an endorsement suggests only that the endorser finds a candidate more palatable than any other presently available.

On the other hand, quasi-political organizations, particularly those that focus on a single or only a few issues, are much more likely to demand and command a candidate's attention and support. The Federalist Society, for instance, is an organization dedicated to strict construction. Were it to endorse a candidate, it stands to reason that the candidate would be seen as a "strict constructionist." Abortion issue groups are among those most likely to endorse only candidates who will be thought to adhere strictly to the relevant "party line." Given their focus and intensity, such groups are much more capable than political parties of bringing their members' wrath to bear on elected officials including judges who stray from their point of view.

The record reflects the increasing role in and influence over judicial election politics exerted by these groups. Among those groups active in recent Minnesota judicial elections were state and local bar associations, the League of Women Voters, an organization called "People for Responsible Government," Minnesota Women Lawyers, Lavender Magazine and the Minnesota Family Council. Such groups can easily bring pressure to bear in judicial elections.[46] Two 1996 examples from judicial elections in other states bear this out. In Nebraska, Supreme Court Judge David Lanphier was defeated in a retention vote after authoring an opinion striking down Nebraska's term limits law. His defeat, largely over the opinion, appears to have been engineered by a single-issue organization named "Citizens for Responsible Government." Similarly, Justice Penny White of the Tennessee Supreme Court was hounded out of office after voting with the majority to remand a death penalty case. The influence of such groups featured prominently in the testimony when the Minnesota Supreme Court held a hearing on whether to expand Canon 5 to exclude all such groups, rather than just political parties.

The court leaves single-issue political parties such as the Twin-Cities Area New Party, which brought the suit in *Timmons*, entirely out in the cold. Many smaller parties including the Right to Life Party, the Natural Law Party, and until this recent election cycle, the Green Party, tend to focus on only a few key issues. These groups are distinguished from advocacy groups only by having exercised their right to organize as a political party. Under the court's opinion, having done so will cost them their rights to engage in election-related speech and association.

If the Minnesota Supreme Court is truly worried about the appearance of or actual judicial bias, it ought to be concerned with more than political parties. By ignoring other political groups, Canon 5 leaves unregulated sources of funding, endorsements and pressures, which, if the court's concerns about judicial partiality are justified, do much more to undermine public perception than political parties. In fact, barring political party involvement will most likely make the system less tenable. By removing the only organizations that endorse candidates across a spectrum of issues, voters are left with only the shrill voice of narrow advocacy coming from special interest groups. Because the canons do not achieve their stated goals, they cannot be considered necessary, and therefore cannot pass strict scrutiny.

---

[46] During the 2000 campaign, two Supreme Court justices received between eight and fifteen percent of their total contributions from one plaintiff's law firm, which had previously been accused of attempting to buy elections with tobacco settlement money. Candidate Filings, Minnesota Board of Campaign Finance & Public Disclosure (2000). Canon 5 does not solve electoral problems, but merely selectively sweeps them under the rug.

D.

Not only must a restriction on speech be necessary, it must also be narrowly tailored to use the least restrictive means in achieving its stated goal. *Burson*, 504 U.S. at 198, 112 S. Ct. 1846. In doing so, a restriction must suppress as little protected activity as possible. "If a less restrictive alternative would serve the Government's purpose, the [state] must use that alternative." *Playboy*, 120 S. Ct. at 1886. Canon 5 runs rampant through acres of protected speech, and in doing so eschews many less restrictive options.

If the court's goals do accurately reflect the actual interests of the people of Minnesota, they could be most efficiently and effectively achieved by amending the Minnesota Constitution to allow for the appointment, rather than the election of judges. This would achieve the court's interests in one stroke, without requiring the suppression of a single protected word. In undertaking its "narrowly tailored" analysis, the court does not discuss this option. Of course, doing so would reopen for the court the sticky problem of Minnesota's having repeatedly expressed a preference for elected judges.

Compliance with the First Amendment does not require so radical a change, for other states have successfully adopted a variety of mechanisms to insulate their judges from the pressures of elected office without impermissibly trenching on protected constitutional rights. Various states, including Nebraska and Tennessee, have adopted the Missouri Plan, discussed in Section I, whereby initially-appointed judges stand in periodic retention elections. Other states have used a more piecemeal approach, remedying specific problems. Some, for instance, alleviate the financial pressures faced by judges for whom the bench provides a livelihood by lengthening terms of office or by providing generous pensions in order to ease the transition back to private practice. Of course, Minnesota's failure to adopt any such scheme does not license the Minnesota Supreme Court to impose on judges and their putative supporters ethical canons abusive to their First Amendment rights.

III.

In sum, the court starts with a series of premises, many of which I accept. The Supreme Court of Minnesota has every right to regulate the state's bench and bar. It may protect its judiciary against both actual and the appearance of partiality. It may adopt measures tempered to do so in the ordinary course of its judiciary's conduct. However, that principle of judicial independence, as has been recognized by almost every court to take up the question, must give way before rights which, unlike the court's policy, have been constitutionally secured. Judges, whatever their differences from other officials, have no more right than others to avoid the rigors of public debate and public elections. No matter what the wisdom of placing the judiciary beyond the rigors of such activities, and no matter what selection method we as federal judges may prefer, the people of Minnesota have adopted an elective judiciary—a system which under our Constitution, must come replete with speech and associational rights.

Because the court finds compelling an interest that is not shared by the people of Minnesota, trumps well established speech and associational rights with values not adopted by the citizens of the state, permits the erection of an unconstitutional self-insulating barrier between the judiciary and the public, and permits regulations that are neither necessary nor narrowly tailored, I must respectfully dissent.

APPENDIX H

UNITED STATES DISTRICT COURT,
D. MINNESOTA

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, AN ASSOCIATION; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION; GREGORY F. WERSAL, INDIVIDUALLY; CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY; CAMPAIGN FOR JUSTICE, AN ASSOCIATION; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION; MICHAEL MAXIM, INDIVIDUALLY; AND KEVIN J. KOLOSKY, INDIVIDUALLY,

PLAINTIFFS,

v.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR, CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR; AND EDWARD J. CLEARY, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR,

DEFENDANTS.

No. 98-831 MJD

Sept. 13, 1999

AMENDED MEMORANDUM OPINION AND ORDER

DAVIS, District Judge.

In this action, Plaintiffs seek declaratory and injunctive relief, enjoining the Minnesota Lawyers Professional Responsibility Board ("Lawyers Board"), the Minnesota Office of Lawyers Responsibility ("Office of Professional Responsibility") and the Minnesota Board of Judicial Standards ("Judicial Board") from enforcing sections of Canon 5 of the Code of Judicial Conduct (the "Judicial Codes"), which prohibits judicial candidates from engaging in certain conduct during judicial campaigns, on the basis that such prohibitions unconstitutionally infringe upon their rights of free speech, free association and equal protection guaranteed under the United States and Minnesota Constitutions. Plaintiffs also seek an award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Background

1. The Parties

Plaintiff Gregory F. Wersal ("Wersal") is an attorney licensed to practice law within the state of Minnesota. Complaint ¶ 6. In 1996 and 1998, he was a judicial candidate for the position of Associate Justice of the Minnesota Supreme Court. *Id.* Wersal's campaign committee, Campaign for Justice, his wife, Cheryl L. Wersal, and brother, Mark Wersal are also named plaintiffs. *Id.* ¶¶ 7, 8 and 10. Plaintiff Corwin C. Hulbert is an unsolicited advocate of Wersal and his endorsement by the Republican Party and its Affiliated Associations. *Id.* ¶ 9. Finally, the Republican Party of Minnesota, together with its Affiliated Associations and their respective members, including Michael Maxim, are named plaintiffs (hereinafter referred to as the "Third Party Plaintiffs"). *Id.* ¶¶ 4 and 5.

The named defendants in this case are the Chair of the Lawyers Board, the Director of the Office of Professional

Responsibility and the Chair of the Judicial Board. The Lawyers Board has general supervisory authority over the administration of the Office of Professional Responsibility and the Rules of Professional Responsibility and may issue opinions on questions of professional conduct. Rules on Lawyers Professional Responsibility, 4(c). The Director of the Office of Professional Responsibility and his office are the staff component of the Lawyers Board, whose function is to investigate and prosecute complaints against lawyers. Rules on Lawyers Professional Responsibility 6(a) and 8(a). Following an investigation, the Director determines whether or not discipline is warranted, and the type of discipline that is warranted. *Id.* Rules 8(d), 9(a) and 12(a). The Judicial Board has jurisdiction to receive complaints, investigate, conduct hearings and make recommendations to the Minnesota Supreme Court concerning judges alleged to have violated the Codes of Judicial Conduct. Rules of Board on Judicial Standards, 2(a).

2. The Judicial Codes

Judicial codes regulating the conduct of judicial candidates in judicial elections have been existence in Minnesota since at least 1950. Defendants' Lungberg and Cleary, Exs. 19 and 20. In the earlier version of the Judicial Codes, the Canons of Judicial Ethics, judicial candidates were instructed not to engage in making political speeches or from soliciting contributions or endorsements from political parties, because "it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes an active promoter of the interests of one political party as against another." *Id.*, Canon 28, Ex. 20, p. 53. A judicial candidate was also instructed not to "announce in advance his conclusions of law on disputed issues". *Id.*, Canon 30, p. 54.

The Judicial Codes did become more specific over time. For example, the Codes of Judicial Conduct adopted in 1974 prohibited judicial candidates from the following: making speeches for a political organization, Canon 7(A)(1)(b)

(1993), soliciting funds or making contributions to political organizations, or attending political gatherings, Canon 7(A)(1)(c), or engage in any other political activity except on behalf of measures to improve the law, the legal system, judicial administration or the administration of justice. Canon 7(A)(4). This set of Canons did allow a judicial candidate to "attend and speak on his or her own behalf at other than partisan political gatherings during the year in which the judge is a candidate for election or reelection." Canon 7(A)(2). Judicial candidates were also directed to maintain the dignity appropriate to judicial office and should encourage family, and employees or public officials subject to the candidate's control from doing what the candidate could not do. Canon 7(B)(1)(a) and (b) (1993). Also, judicial candidates were directed not to make pledges or to "announce his or her views on disputed legal or political issues". Canon 7(B)(c) (1993).

In 1995, the Judicial Codes addressing the regulation of judicial candidates were amended and are now addressed in Canon 5. Canon 5 was again amended on December 23, 1997, by adding language to clarify ambiguities that resulted from the 1995 amendments.[1] The Sections of Canon 5 relevant to this case, in its present form, are provided below, with the December 1997 amendments underscored:

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06, Subd. 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

---

[1] For example, the 1995 Judicial Codes prohibited a judicial candidate from attending political gatherings in Canon 5 A(1)(d), while Canon 5 B(1) allowed the judicial candidate to speak to gatherings on his/her own behalf. Ex. J to Wersal Aff.

(a) act as a leader or hold any office in a political organization; *identify themselves as members of a political organization; except as necessary to vote in an election*;

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; *or seek, accept or use endorsements from a political organization*; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

* * * * * *

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except as otherwise permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(1) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent;

* * * * * *

B. (1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings, *other than political organization gatherings*, on his or her own behalf;

* * * * * *

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, *but shall not seek, accept or use political organization endorsements.* Such committees shall not disclose to the candidate the identity of campaign contributors *nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.* A candidate shall not use or permit the use of campaign contributions for the private benefits of the candidate or others.

* * * * * *

D. *Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.*

* * * * * *

3. Background

Plaintiffs state that during Wersal's 1996 campaign, the Campaign for Justice, as well as Wersal's wife, brother and members of the Republican Party or an Affiliated Association, engaged or participated in one or more of the following types of speech or association on Wersal's behalf: attended gatherings of the Republican party and its affiliated associations and distributed campaign literature and spoke at such gatherings; announced that Wersal was in favor of a strict construction of the Constitution and was critical of certain decisions of the Minnesota Supreme Court; identified Wersal as a member of the Republican party; sought the Republican party's endorsement for Wersal; and solicited campaign contributions. *Id.* ¶¶ 14, 15 and 46. As a result of such conduct, an individual filed a complaint with the Office of Professional Responsibility against Wersal, alleging violations of Canon 5 of the Judicial Codes. Complaint ¶ 15, Ex. C to Wersal Affidavit. The complainant was concerned with Wersal's attendance and speech at the Republican Congressional District Convention and of his seeking partisan support for his campaign. The complainant also noted concern that Wersal was addressing issues which may come before the court to which he sought election. *Id.*

The complaint was investigated and dismissed for three reasons. First, as to Wersal's attendance at a political gathering, the Director of the Office of Professional Responsibility determined that the Canons in force at that time were ambiguous, as one Canon prohibited attendance at political gatherings while another allowed speech at a "gathering." Because of the ambiguity, the Director doubted that she could establish that attendance at a political gathering by a judicial candidate was prohibited. *Id.*, ¶ 17, Ex. D. With respect to seeking political endorsements, the Director determined that Wersal is only prohibited from personally seeking endorsements, and that Wersal did not engage in this type of conduct. *Id.* As to the issue of announcing views on disputed legal or political issues, the Director stated:

> The current prohibition contained in Minnesota Canon 5A3(d)(i) is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The ABA adopted the 1990 version out of concern over the constitutionality of the 1972 version. Although adoption of the 1990 version was proposed to the Minnesota Supreme Court in June 1994 by the Minnesota Advisory Committee to review the American Bar Association Model Code of Judicial Conduct, it was not adopted by the Minnesota Supreme Court.
>
> * * * * * *
>
> The Director's Office had doubts about the constitutionality of the current Minnesota Canon and its application to respondent's statements. In addition the Director doubts she would be able to prove by clear and convincing evidence that the statements in respondent's campaign materials constitute an announcement of his views on the issues of crime, welfare or abortion, let alone that they appear to

> commit respondent with respect to any of these three issues. For these reasons the Director has determined that discipline is not warranted.

Ex. D. to Wersal Aff.

Even though the complaint was dismissed, Wersal asserts that he withdrew his candidacy for Associate Justice as a result of the Complaint, fearing that further Complaints would be filed against him, jeopardizing his ability to practice law. *Id.* ¶ 20.

In January 1997, Wersal announced his intention to once again run for the office of Associate Justice of the Minnesota Supreme Court in the primary and general election of 1998. *Id.* ¶ 21. However, as a result of amendments to Canon 5 of the Judicial Codes that took effect in 1997, Plaintiffs allege that Wersal and others acting on his behalf were no longer able to attend and speak at gatherings of political organizations, were not able to identify Wersal as a member of the Republican Party, were not allowed to discuss Wersal's views on many disputed legal and political issues, and were prevented from soliciting contributions from political parties and from seeking, accepting or using a political party endorsement. *Id.* ¶ 27-29.

Plaintiffs allege that as a result of Canon 5's prohibitions, Wersal was not endorsed by the Republican Party or any of its Affiliated Associations and because he was not allowed to attend or speak at its political gatherings, the Third Party Plaintiffs were not given the opportunity to hear of Wersal's views on disputed issues. The Third Party Plaintiffs allege that the prohibitions contained in Canon 5, as applied to them, adversely affected its members because they were denied the necessary information about Wersal to allow them to make an informed decision at the voting booth.

In February 1998, Wersal sought an advisory opinion from the Office of Professional Responsibility as to whether the Office intended to enforce the prohibitions against judicial candidates: 1) speaking on their own behalf to political party organization gatherings; 2) seeking, accepting or using endorsements from a political party organization; and 3) announcing his or her views on disputed legal issues. *Id.*, ¶ 33. The Office of Professional Responsibility responded in the affirmative to the first two questions, but declined to answer the third on the basis that Wersal had failed to specify what statements he would make that may or may not be a view on a disputed legal or political issue. The Director reiterated his concern, however, that the announce clause was not constitutional as written. Ex. W to Wersal Aff.

In their Complaint, Plaintiffs have asserted five separate claims. In Count One, Plaintiffs allege that Canons 5 A(1) and B(1), which prohibits judicial candidates, their families and others acting on the candidate's behalf, from attending and speaking at political gatherings, infringes upon their rights to freedom of speech and association as guaranteed them under the United States and Minnesota Constitutions. Complaint ¶ 35. Plaintiffs also allege that this prohibition violates the equal protection clauses of the United States and Minnesota Constitutions, as the Judicial Codes' definition of political organization affects political organizations such as the Republican Party, but no "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association or MADD. *Id.* ¶ 40. In Count II, Plaintiffs allege that the ban on judicial candidates from announcing their views on disputed legal or political issues contained in Canon 5 A(3), violates the individual plaintiffs' freedom of speech. *Id.* ¶¶ 42 and 61. Counts III and IV assert claims involving the violation of the rights of freedom of speech, freedom of association and equal protection, as a result of the Judicial Codes ban on judicial candidates identifying their political party contained in Canon 5 A(1), and the ban on seeking, accepting or using political party endorsements contained in Canon 5 A(1) and B(2). *Id.* ¶¶ 62 and 79. Finally, in Count V, Plaintiffs assert Canon 5 B(2)'s ban on judicial candidates personally soliciting campaign contributions is a violation of the right to freedom of speech. *Id.* ¶ 102.

Plaintiffs moved for a temporary restraining order to enjoin the enforcement of Canon 5 prior to the precinct caucuses on March 3, 1998. The motion was denied. On November 2, 1998, the Eighth Circuit affirmed this Court's decision to deny the TRO, but expressed no opinion on the merits of Plaintiffs' claims. *Republican Party of Minnesota v. Kelly*, 163 F.3d 602, 1998 WL 764782 (8th Cir. 1998).

Currently before the Court are cross motions for summary judgment.

Standards for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992).

In order to prevail against the claims asserted in the Complaint, the Defendants must establish that the relevant sections of Canon 5 of the Judicial Codes are narrowly tailored to serve a compelling state interest. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 141-142 (3rd Cir. 1991).[2]

---

[2] The Defendants assert that other standards may be applicable to the constitutional challenges presented by Plaintiffs in their Complaint. For purposes of the current motions before the Court, however, the Defendants will not dispute the applicability of the strict scrutiny analysis.

Analysis

I. Bans on Political Activity

A. Compelling State Interest

At issue in this case is the conflict of two principles, the roots of which "lie deep in our constitutional heritage." *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993). One is the freedom of candidates to express their views on all matters of interest to the electorate. *Id.* The other, is that "[j]udges should decide cases in accordance with the law rather than with any express or implied commitments that they may have made to their campaign supporters or others." *Id.*

The Defendants herein assert that those provisions of Canon 5 that prohibit a candidate from: 1) attending and/or speaking at gatherings of political parties, 2) identifying himself/herself as a member of a political party, and 3) seeking, accepting or using an endorsement from a political party were enacted because of the long recognized principle that politics can interfere with the actual and apparent integrity and independence of the judiciary. Defendants further assert that the bans on political activity by a judicial candidate are narrowly tailored to serve several compelling state interests: preventing bias or the appearance of bias in favor of the judge's political party or against members of a rival party; preventing bias or the appearance of bias in judge's decisions of particular cases that involve party positions; promoting judicial independence by helping to ensure judges owe their jobs to no one but the general electorate. Defendants assert Canon 5 serves to accomplish these goals by regulating the conduct of the judicial candidate, and those under his or her control while preserving the freedom of the general electorate, including political parties, to seek information necessary to make an informed choice at the voting booth.

Plaintiffs argue that by choosing to elect judges, the state of Minnesota "does not have an independent judiciary." Plaintiff Wersal's Memorandum in Support of Motion for Summary Judgment, p. 2. Plaintiffs further argue that there are no facts to support the Defendants' assertion that political influences have a negative effect on the independence of the judiciary. The Court rejects both of these assertions. Plaintiffs have failed to put forth any authority for its assertion that by choosing to elect judges, the state has no interest in restricting the influences of partisan politics on judicial candidates. As aptly noted by the Third Circuit Court of Appeals: "The fact that a state chooses to select its judges by popular election, while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly." *Stretton*, 944 F.2d at 142. Furthermore, there is sufficient evidence to support the finding that the influences of the political parties have a negative effect on the independence of the judiciary.

Although the framers of Minnesota's constitution adopted the process of judicial selection through popular election, the historical record does not suggest that in doing so, the state disregarded the notion of judicial independence in favor of the political process. In fact, in its summary of the history of Minnesota's system for selecting judges, the Minnesota Supreme Court wrote that the system eventually adopted by the framers of Minnesota's Constitution recognized the necessity of maintaining an independent judiciary. *Peterson v. R.H. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992) *cert. denied*, 507 U.S. 1033, 113 S.Ct. 1852, 123 L. Ed. 2d 475 (1993).

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent

> judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences. That that goal guided the framers of the federal Constitution to grant life tenure to judges is evidenced by the writings of Alexander Hamilton which expressed concern that life tenure would provide judges sufficient security to allow them to rule with their consciences and according to the Constitution, rather than to bow to political notions. While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Id. Initially, the framers attempted to distinguish judicial elections by providing judges with seven year terms so that judicial elections would not occur at the same time as elections for other elective office. *Id.* It wasn't until judicial terms were thereafter reduced to six years that "the difficulties associated with partisan [judicial] elections became more evident." *Id.*

One clear example of the influence of political parties upon judicial elections occurred when "at the election of 1898, judicial offices had been dragged into politics." 1 History of the Bench and Bar of Minnesota 66 (1904). Justice William Mitchell was first appointed to the Minnesota Supreme Court in 1881. At the succeeding election, he was nominated by the democratic and republican party. *Id.* "By the same non-partisan unanimity he was re-elected in 1886 and again in 1892." *Id.* During the election of 1898, however, Justice Mitchell was not nominated by the republican party "and at the election which followed, Minnesota lost its greatest judge."[3] *Id.*

---

[3] That Justice Mitchell was a great jurist, respected throughout the country as well as in Minnesota, is illustrated by a letter written by a

To counter the conflicts that had arisen and the potential conflicts that could arise "between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering", legislation was passed providing for judicial elections to be nonpartisan in 1912. *Peterson* 490 N.W.2d at 422. After judicial elections became nonpartisan, however, the concern remained that political influence would nonetheless infiltrate the judicial election process. For example, in *Moon v.*

Harvard Law Professor to a friend in Minnesota. In the letter, Professor Thayer wrote:

> I am astonished that there is doubt of the re-election of Judge Mitchell to your supreme court. I wish the people of Minnesota knew the estimate that is put upon him in other parts of the country, and there could be no doubt about it then . . . I have long recognized Judge Mitchell as one of the best judges in this country, and have come to know also the opinion held of him by lawyers competent to pass on an opinion on such a question . . . Pray do not allow your state to lose the services of such a man. To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law. Your state it is that is now on trial before the country. The question is: Can Minnesota appreciate such a man? Is it worthy to have him? I am not going to believe that a state which can command the services of one of the few judges in the country that stand out among their fellows as pre-eminent, that give it distinction, will refuse to accept these services. You lawyers of Minnesota must not let party politics work any such result.

1 History of the Bench and Bar of Minnesota, 71.

Justice Mitchell is also the namesake of the William Mitchell College of Law, whose distinguished alumni include The Honorable Warren E. Berger '31, Chief Justice of the United States Supreme Court, 1969-1986, The Honorable Douglas K. Amdahl '51, Chief Justice, Minnesota Supreme Court, 1980-1988, The Honorable Rosalie E. Wahl '67, Associate Justice, Minnesota Supreme Court, 1977-1994, and the Honorable Paul A. Magnuson '63, Chief Judge, United States District Court, District of Minnesota.

Halverson, 206 Minn. 331, 288 N.W. 579 (1939), the court was asked to interpret the Minnesota statute[1] that provided that the office of chief justice and associate justice of the Supreme Court and all elective county offices would be non-partisan. Specifically at issue in that case was whether an individual running for the office of the register of deeds could solicit political party support without violating § 294. Although judicial elections were not specifically at issue in *Moon*, Justice Loring nonetheless took the opportunity to submit a concurring opinion to voice his concern regarding political party endorsements of judicial candidates.

> When candidates for such offices were placed on a non-partisan ballot it was, it seems to me, the purpose of the legislature to lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions on matters where party programs, party interests or even prominent party leaders might be involved. *The abuse and accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing [sic] party ought to be evidence enough of the impropriety of party indorsements [sic] and of their purpose to induce partisan political rather than impartial judicial decisions.* Judges are or should be elected to interpret the law as they find it without fear or favor. It poisons the very fount of democracy if they do not do so. Nothing so shakes the confidence of the people in their courts and arouses contempt for their government, as politically minded judges. There can be no propriety in any influence which tends, consciously or otherwise, to prevent impartiality or which tends to

---

[1] 1 Mason Minn. St. 1927 § 294.

> create a feeling of party obligation. If the statutes or the constitution, as interpreted by courts, do not suit the people the proper remedy lies in the legislature or by amendment to the constitution, not in judicial misinterpretation.

Id., 288 N.W.2d at 581-582 (emphasis added). The inherent tension in the judicial election process was again recognized in the 1972 Constitutional Study Commission, Judicial Branch Committee Report, which recognized that "qualified lawyers may not seek judicial appointment for fear they will give up their practice only to be defeated by a politician with a popular name" and that the "public finds it distasteful for judges to become embroiled in politics." *Peterson*, 490 N.W.2d at 422-423.[5]

In determining whether the state has a compelling interest in maintaining the actual and apparent independence of the judiciary, the Court must keep in mind the functions of the judiciary, compared to those of the executive and legislative systems.

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that

---

[5] This Court is also mindful of numerous examples in other states, in which judicial elections were influenced by partisan politics. *See e.g., Geary v. Renne*, 911 F.2d 280, 309-314 (9th Cir. 1990) (J. Alarcon dissenting) *vacated and remanded Renne v. Geary*, 501 U.S. 312, 111 S.Ct. 2331, 115 L. Ed. 2d 288 (1991) (discussing the effect that California's political parties had on the integrity and independence of the judiciary and local office holders); Penny J. White, *Judicial Independence: Second Steps*, 38 JUDGES' JOURNAL No. 3, ¶ 5-8 (Summer 1999) (discussing the effect that single issue, negative political maneuvering had on authors' retention election to the Tennessee Supreme Court, as well as other examples).

> voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton, 944 F.2d at 142. *See also, Buckley*, 997 F.2d at 228 ("judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.") It is these very differences that have been the basis for finding that the state has a compelling interest in imposing restrictions in judicial campaigns. *See e.g., Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977) *cert. denied*, 435 U.S. 1013, 98 S.Ct. 1887, 56 L. Ed. 2d 395 (1978); *Ackerson v. Kentucky Judicial Retirement and Removal Comm.*, 776 F. Supp. 309 (W.D. Ky. 1991). "An evenhanded, unbiased and impartial judiciary is one of the pillars upon which our system of government rests. To the degree appropriate, the conduct of judicial elections ... may be regulated so as to meet that interest, even if freedom of speech is thereby constrained." *Ackerson*, 776 F. Supp. at 313. *See also, Haffey v. Taft*, 803 F. Supp. 121, 125 (S.D. Ohio 1992) (in upholding state statute that prohibited the identification of judicial candidate's political affiliation on general ballot, court recognized that the state has a significant interest in keeping politics out of judicial elections.)

The United States Supreme Court has recognized, in the context of federal and state employees, that partisan political activities must be limited in order to ensure meritorious performance. *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L. Ed. 2d 796 (1973) (upholding Hatch Act restrictions on federal employees); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L. Ed. 2d 830 (1973) (upholding state statute imposing restrictions on state employees in political party activities).

> Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.

Letter Carriers, 413 U.S. at 557, 93 S.Ct. 2880. The Court held that not only was it important that the Government and its employees in fact avoid practicing political justice, it was also "critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Letter Carriers*, at 565, 93 S.Ct. 2880.

Applying this rationale to the judicial candidate, the court in *Morial* noted "[t]he government has at least as great an interest in assuring the impartiality of judicial administration of the laws as in assuring the impartiality of bureaucratic administration of the laws." *Id.*, 565 F.2d at 302. The Court in *Letter Carriers* and *Broadrick*, as well as the court in *Morial*, recognized the essential role political parties play in the electoral process, but at the same time recognized that political influence, or the appearance thereof, is simply not compatible with the administration and interpretation of the law.

In support of their position that the state has no compelling interest in preserving an independent judiciary by restricting political activities of the judicial candidate and his/her supporters, Plaintiffs rely on a line of cases that addressed the constitutionality of a California Election Code and a California constitutional provision that banned political party endorsements at primaries and banned political parties from endorsing, supporting or opposing a candidate for nonpartisan office. *Eu v. San Francisco County Dem. Central Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 103 L. Ed. 2d 271 (1989); *Renne v. Geary*, 501 U.S. 312, 111 S.Ct. 2331, 115 L. Ed. 2d 288 (1991); *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996).

In *Eu*, the United States Supreme Court held that a ban on political parties' right to endorse candidates at primaries burdened their rights to free speech and free association, and that the ban could survive constitutional challenge only if such ban served a compelling state interest. The state had argued that the ban served to stabilize government and to protect voters from confusion and undue influence. The Court found, however, that the state had not shown how the ban served these asserted interests. 489 U.S. at 229, 109 S.Ct. 1013. Similarly, in *Lungren*, the district court struck down a state constitutional prohibition of party endorsements of candidates for non-partisan office. In doing so, the court rejected the state's assertion that it had a compelling state interest in preventing voters from being unduly influenced by political party endorsements. *Lungren*, 919 F. Supp. at 1402 (citation omitted).

Eu and its progeny are not controlling here, however, as the bans at issue in this case focus on the conduct of the judicial candidate, while the *Eu* line of cases address bans that restricted the conduct and speech of political parties and its members. This distinction is crucial and was pointed out by the court in *Lungren*.

> The court will assume arguendo that California has a compelling interest in preventing nonpartisan officeholders from engaging in conduct that tends to undermine the nonpartisan nature of their posts. Even so, Section 6(b) misses the mark. The evil sought to be combated is the unseemly partisanship of nonpartisan officers once they are in office, not the partisanship of political parties (which, of course, is the very nature of

> political parties). Section 6(b) purports to prevent officeholders from being "beholden" to political parties by imposing a ban on the parties' speech about candidates for office, rather than (as the Supreme Court approved in Letter Carriers) a ban on the partisan political conduct of the officeholders themselves. *This distinction is crucial.* The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices.

919 F. Supp. at 1402 (emphasis added). The court went on to note that "California can, of course, prohibit judges from engaging in partisan political activity once they are in office." *Id.* at 1405 (citing *Letter Carriers*, 413 U.S. at 564-65, 93 S.Ct. 2880.) Clearly, if judges are prohibited from engaging in political activity once in office, then judges that are seeking reelection are similarly prohibited from such activity. I[t] stands to reason, then, that in order to prevent a lawyer candidate from gaining an unfair advantage during an election by garnering the support of a political party, lawyer candidates should also be prevented from engaging in political activity during the election.

The Third Party Plaintiffs argue that Canon 5 as applied to them, does, in fact, infringe on their rights of free speech, free association and of their right to receive information. Thus, *Eu* and its progeny are directly applicable to the issue of whether the state has a compelling interest sufficient to withstand scrutiny. In support of their argument, the Third Party Plaintiffs have submitted twenty examples of how their rights to freedom of speech, association and the right to receive information were infringed by Canon 5. For example, the Third Party Plaintiffs identify a number of its members that did not receive or transmit any information about Wersal or other judicial candidates at

Republican Party conventions because of Canon 5. *See generally*, Response Memorandum of Republican Party, ¶.5-10. Because of these restrictions, the Third Party Plaintiffs argue that it was unable to endorse Wersal for the position of Associate Justice.

This argument is without merit. Nothing in Canon 5 prohibits political parties from endorsing judicial candidates, or from accessing information on a judicial candidate in order to allow them to make an informed choice at the voting booth. The fact that attendees at political gatherings prior to the elections in 1998 misunderstood Canon 5 and its proscriptions does not alter the reality that the Canons do not prevent political parties or its members from seeking information on judicial candidates. While such information is not available at party conventions from the candidate, there exists alternative means to access information on judicial candidates. For example, candidates are not prohibited from communicating to the voters through the media, literature or on a door-to-door basis.

Finally, Plaintiffs argue that the state has produced no facts to support its assertions that the state has a compelling interest in maintaining an independent judiciary and that restricting political activity by judicial candidates narrowly serves that interest, relying only on conclusory statements. A similar argument was rejected in *Kirchgessner v. Wilentz*, 884 F. Supp. 901 (D.N.J. 1995). In *Kirchgessner*, the district court held that a New Jersey Supreme Court policy that prohibited probation officers from becoming affiliated with law enforcement organizations did not violate the probation officers' rights of freedom of association. In so finding, the court held that probation officers, as employees of the judicial branch of government, must be perceived as free from outside influences, and that membership in law enforcement associations would harm that perception. 884 F. Supp. at 913. Plaintiffs in that case had argued that there was no evidentiary support for the court's finding. The court responded to this concern by noting:

> [T]he only way you could have empirical data is when partiality is developed, when conflict is developed and at that point it is too late, the system is brought down under its own weight . . . there can[not] be any basis, other than for theory unless the system went so awry, unless the system was so rife with corruption or partiality that [the evidence] would [then] be[come] objective . . .
>
> What makes the judiciary viable in any governmental setting is th[e] distance that impartiality and the appearance of impartiality . . . [create and which] people can rely on.

Id.

This Court rejects this argument as well. As recognized by the Minnesota Supreme Court: "A judge has a position of power and prestige in a democratic society espousing justice for all persons under law . . . Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (Minn. 1984). It is also well recognized that political activity by a judge or judicial candidate creates a potential for conflicts of interests. *See, e.g., Peterson*, 490 N.W.2d at 422. Accordingly, Defendants need not show that individual cases were decided wrongly due to the corruption of the judicial system caused by those activities prohibited by Canon 5.

The Court finds that Defendants have established that the State of Minnesota has a compelling interest in maintaining the actual and apparent integrity and independence of its judiciary and that the bans on political activity may be upheld if they are narrowly tailored to serve that interest.

B. Narrowly Tailored

Plaintiffs argue that the bans on political activity are not narrowly tailored to serve the state's interest in protecting the independence of the judiciary. Plaintiffs assert that the bans resulted in the Third Party Plaintiffs not being able to receive or transmit any political communications relating to Wersal, such as his name, law school or employer. As noted above, however, this argument is without merit. Alternative means exist through which voters may obtain information concerning judicial candidates. Because such information is available to the Third Party Plaintiffs through such means, the Court finds the Canons are narrowly tailored to serve the state's compelling interests.

C. Vague

The Third Party Plaintiffs further argue that Canon 5 does, in fact, infringe upon their rights under the First Amendment because the Canon is vague. Canon 5(A)(3)(c) provides that a candidate for judicial office "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." The Third Party Plaintiffs assert that this provision is constitutionally vague, as it can be interpreted as prohibiting any supporter of a candidate from engaging in the proscribed political activities, including political parties and their members. They argue that any supporter who attends a political gathering on the judicial candidate's behalf, or otherwise engages in conduct on behalf of the judicial candidate in such a way as to permit an inference that the candidate knew of such activities, technically violates the Judicial Codes—leaving open the possibility that an ethical complaint may be filed.

The Court finds this argument to be without merit as well. To succeed on the argument that the Canon is unconstitutionally vague, Plaintiffs must show that "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. at 607, 93 S.Ct. 2908. The words "authorize" and "permit" are commonly used words that both involve the concept of consent.[6] "Knowingly permit" is a commonly used phrase in Minnesota statutes, *See*, Levinger Aff., Ex. 8 and 9, and it has been given a narrow construction by the Minnesota Supreme Court. *See*, *Johnson v. Holzemer*, 263 Minn. 227, 116 N.W.2d 673 (1962). In *Holzemer*, the court held that the phrase "knowingly permit" as used in a criminal statute that declared "every person . . . knowingly permitting any such minor to violate [a firearm's possession law] shall be guilty of a misdemeanor" applied only to those persons having "some right to authoritative control" over such minor, such as a parent, a guardian, a teacher or law enforcement officer. *Id.* 263 Minn. at 237, 116 N.W.2d at 679. Thus, the statute only applied to persons who had the power to give or enforce commands or directions to the minor. *Id.* Given this interpretation by the Minnesota Supreme Court, the terms "authorize" and "knowingly permit" as used in Canon 5(A)(3)(c) applies only to those persons over which the judicial candidate has some right or authoritative control. This interpretation necessarily implies that only if a close connection exists between the judicial candidate and the supporter, will the provisions in Canon 5 A(3)(c) come into play.

D. Equal Protection

The Third Party Plaintiffs also argue that the partisan political prohibitions provided in Canon 5 violate their right to equal protection as such prohibitions are applicable to political parties only, and not special interest groups. Plaintiffs assert that the asserted compelling state interest of maintaining the independence of the judiciary would also be served by imposing similar prohibitions on special interest groups such as the Minnesota Women Lawyers, or Minnesota Citizens Concerned for Life.

---

[6] "Permit" is defined as: 1. To consent to: Allow. 2. To give permission to or for: authorize. 3. To afford opportunity to. Webster's II New College Dictionary (1995). "Authorize" is defined as: 1. To give authority or power to. 2. To approve or permit: sanction. *Id.*

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the law." To survive an equal protection challenge, Defendants must demonstrate that the state has a compelling state interest justifying the classification, and that such classification is narrowly tailored to serve such interest. At the same time, however, the Court must keep in mind that a state need not exercise the full extent of its power to prevent an evil in order to comply with the equal protection clause. *Morial*, 565 F.2d at 302 n. 6 (relying on *Buckley v. Valeo*, 424 U.S. 1, 29, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976)). *See also*, *Broadrick*, 413 U.S. at 607, n. 5, 93 S.Ct. 2908 (recognizing that "the legislature must have some leeway in determining which of its employment positions requires restrictions on partisan political activities and which may be left unregulated . . . And a state can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.")

In this case, the Minnesota Supreme Court "chose to limit what it perceived to be the most problematic type of political conduct by judicial candidates—that linking those candidates with partisan political parties." Memorandum of Defendant Flinn in Support of Motion for Summary Judgment, p. 18. Partisan political activity was determined to be the most problematic given the breadth of the parties' platforms and agendas, and of the greater membership and affiliations than special interest groups. Furthermore, Defendants assert that special interest groups may exist that would be an appropriate contact for a judicial candidate, such as a group created to support improvements in the administration or organization of the courts.

Other courts have upheld statutes that treat partisan political activity different from non-partisan political activity. *See e.g., Letter Carriers*, 413 U.S. at 562, 93 S.Ct. 2880 (upholding Hatch Act, which restricted political activities of federal employees, but not non-partisan political activity); *Bauers v. Cornett*, 865 F.2d 1517, 1525 (8th Cir. 1989).

Because the Judicial Codes' restrictions on partisan political activity clearly relate to the state's compelling interests, there is no violation of the equal protection clause. In so finding, the Court has determined not to fault the Minnesota Supreme Court for not exercising the full extent of its power to eradicate all possible sources of improper influence towards the judiciary.[7]

II. Ban on Judicial Candidate Personally Soliciting Contributions

Canon 5 B(2) of the Judicial Codes prohibits a judicial candidate from personally soliciting campaign contributions. The Canon also provides that a judicial candidate may establish a committee to solicit and accept funds on the candidate's behalf, but the committee is prohibited from disclosing the identity of contributors.

Defendants assert that the state has a compelling interest in avoiding "unfair pressure on the solicited, potential pressures on the judge to later show favoritism, and the appearance of corruption." Defendant Flinn Memorandum in Support of Motion for Summary Judgment, p. 21. Defendants further assert that the Canon is narrowly tailored to serve this purpose, as it allows judicial candidates to obtain financial support for his/her campaign through a committee while safeguarding its compelling interest by preventing the candidate from learning of the contributions' source.

---

[7] Plaintiff Wersal argues that the state cannot discriminate against political parties as opposed to special interest groups on the basis that the U.S. Supreme Court has consistently held that the government cannot prohibit the fundamental rights of free speech or free association based on the content of the speech or the type of group engaging in the speech. Wersal Reply Memorandum in Support of Motion for Summary Judgment, p. 7. Wersal then cites to a number of Supreme Court cases, such as *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 120 L. Ed. 2d 305 (1992). Plaintiff's reliance *R.A.V.* is misplaced, however. The Court in *R.A.V.* specifically noted that "presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions . . . with respect to certain speech by government employees" citing to *Broadrick, supra*, and *Letter Carriers, supra*.

A similar ban was upheld by the Third Circuit in *Stretton*, 944 F.2d at 146. *See also, Suster v. Marshall*, 951 F. Supp. 693, 704 (N.D. Ohio 1996) *aff'd*, 149 F.3d 523 (6th Cir. 1998) (Ohio Judicial Code prohibiting judicial candidates from personally soliciting campaign funds appeared to be constitutional).

Plaintiff Wersal does not appear to contest that the state has a compelling interest in preventing the undue influence of money on judicial candidates. Wersal argues, however, that the ban on personal solicitation is unconstitutional as it is not narrowly tailored to serve such interest because other Code provisions protect the interest. Wersal argues that any concern with the corrupt influence of money on judicial candidates is fully alleviated by the Code provision that prevents a judicial candidate from knowing the identity of contributors. In support, Wersal cites to *Stretton* for the proposition that it is the candidate's knowledge of the contribution that gives the appearance of undue influence. The Court does not agree. The court in *Stretton* stressed that a judicial candidate's personal solicitation of campaign contributions "lends itself to the appearance of coercion or expectation of impermissible favoritism." *Stretton*, 944 F.2d at 146. Thus, although in *Stretton* the court acknowledged that the codes at issue did not prohibit the candidate from learning of contributors' identities, it held that "we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense, personal solicitation by the candidate." *Id.*

The Third Party Plaintiffs argue that the personal solicitation ban on judicial candidates violates their free speech and associational rights, relying on *Buckley v. Valeo, supra* and *Suster v. Marshall, supra*. Neither case, however, supports their argument that a ban on personal solicitation by judicial candidates violates first amendment rights. *Buckley* addressed limits on political contributions, and *Suster* addressed contribution limits and a ban on personal solicitation, expressly stating the ban on personal solicitation "appears constitutional."

The Court finds that the state has a compelling interest in preventing the undue influence, and the appearance of undue influence, that may result in a judicial candidate personally soliciting campaign funds. The Court further finds that the Codes are narrowly tailored to serve that interest.[8]

III. Announce Clause

In Count 2 of the Complaint, Plaintiffs argue that the announce clause violates their rights to free speech under the U.S. and Minnesota Constitutions. Prior to addressing the merits of Plaintiffs' claim, the Office of Professional Responsibility and the Lawyers Board argue that there is no case or controversy before the Court with respect to these Defendants. To establish a case or controversy, a plaintiff must demonstrate that there exists a danger of sustaining an injury as a result of a law's operation or enforcement. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L. Ed. 2d 895 (1979). It is sufficient if the injury is impending. *Id.* The

---

[8] Wersal argues that he only seeks to personally solicit large groups, and that such a change to the Canons was recommended by the Minnesota State Bar Association. Wersal does not attempt to define "large group" nor does he explain why personally soliciting a large group is distinguishable from other groups. The Court finds, however, that there is no basis for such a distinction.

Lawyers Board and the Office of Professional Responsibility argue that they pose no injury or threat of injury with respect to the announce clause, as they have not enforced the clause and do not intend to do so unless the Court finds the clause constitutional. However, nonenforcement will not be an impediment to finding justiciability where the record does not show that the statute or rule at issue has been commonly and notoriously violated in the past. *See, San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987) *aff'd* 489 U.S. 214, 109 S.Ct. 1013, 103 L. Ed. 2d 271 (1989) (citing *Babbitt*, 442 U.S. at 302-303, 99 S.Ct. 2301 and *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L. Ed. 2d 228 (1968)). In this case, there is no showing that the announce clause has been commonly and notoriously violated in the past. Thus, nonenforcement will not impede a finding of justiciability. Accordingly, the Court finds that it properly has jurisdiction to decide Count II as against all Defendants.

Canon 5 A(3)(d)(i) prohibits judicial candidates from "announcing their views on disputed legal or political issues." The Judicial Board[9] asserts that the announce clause serves the compelling state interest of maintaining the actual and apparent impartiality and independence of the judiciary by preventing a candidate from committing himself/herself as to certain issues prior to being faced with a particular case or controversy.

A number of courts in other jurisdictions have addressed the same or substantially similar issue. In each, the court has found that the state has a compelling interest in limiting the First Amendment rights of judicial candidates in order to maintain the actual and apparent impartiality and independence of the judiciary. *See, Buckley*, 997 F.2d at 227-228; *Stretton*, 944 F.2d at 142; *Ackerson*, 776 F. Supp.

---

[9] The Lawyers Board and the Office of Professional Responsibility take no stand on the constitutionality of the announce clause.

at 312; *American Civil Liberties Union of Florida, Inc. v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *Berger v. The Supreme Court of Ohio*, 598 F. Supp. 69, 74 (S.D. Ohio 1984) *aff'd* 861 F.2d 719, 1988 WL 114792 (6th Cir. 1988).

> The public has a right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially. Even if he or she should reach the correct result in a given case, the campaign announcement would leave the impression that, in fact, if not in actuality, the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined.

Stretton, at 144.

This Court does not hesitate in finding that the state has a compelling interest, necessitating the restriction of judicial candidates' speech to maintain the integrity of the judiciary. The critical issue with respect to the announce clause is whether it is narrowly tailored to serve that interest. In *Stretton, supra*, the Third Circuit upheld similar language against a constitutional attack by construing the canon narrowly. In doing so, the court noted that the Chief Counsel of the Disciplinary Board, the General Counsel of the Judicial Inquiry and Review Board had interpreted the canon "as prohibiting a candidate only from announcing a position on an issue that may come before the court for resolution." *Id.*, 944 F.2d at 142. In construing the canon narrowly, the court also recognized that when a statute or regulation is challenged, the court should employ an interpretation that will avoid constitutional difficulties. *Id.* at 143 (citations omitted). The court then found that the State Supreme Court had, in the past, interpreted its rules in the light necessary to obviate the constitutional objections. *Id.*

By contrast, the court in *Buckley, supra,* held the identical language violated the First Amendment, because the canon reached far beyond speech that could reasonably be interpreted as committing a candidate in a way which would compromise impartiality if such candidate succeeded in the election. The defendants in *Buckley* urged the court to adopt a narrow construction of the canon, by asserting the canon allows a candidate a right to reply, and that the word "announce" should be read to encompass only statements in which a judicial candidate tells the electorate how he/she will vote on a particular case. The court rejected the invitation to construe the canon in the narrow manner suggested by the defendants and the district court. *Id.* at 230. The court then went on to distinguish its determination from that in *Stretton*.

> The [Stretton] court did not have the benefit of the insight into the scope of such a rule as is provided by a ruling such as that of the Illinois Courts Commission that condemned so innocuous a statement as a candidate's report of his past record ruling on a particular type of case (Justice Buckley's comment on rape convictions.) Nor did it have to confront the complexities introduced by a concession that a candidate has a broad right of reply or that the word "announce" should be read to mean to foretell one's vote.

Buckley, at 230.

The Judicial Board asserts that the announce clause can and must be interpreted narrowly to preserve its constitutionality, consistent with federal and state law. The Judicial Board further argues that in those cases that have held similar announce clauses unconstitutional, the courts have done so on the "assumption that the prohibition against announcing views on disputed legal or political issues leaves a judicial candidate with nothing more to discuss and put before the voters other than 'name, rank, and serial number.'" Defendant Flinn Memorandum in Support of Motion for Summary Judgment, p. 24. However, the announce rule does not prohibit judicial candidates from discussing or stating their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience. *Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979). Thus, contrary to the finding of the court in *Buckley*, the Judicial Codes do not prevent candidates from discussing more than their name, rank and serial number.

Plaintiffs ask the Court to follow those cases that have found similar announce clauses unconstitutional. Plaintiffs further assert that the announce clause is modeled after an earlier version of the American Bar Association ("ABA") Model Canons, but that the ABA recently amended their Model Canons and that the current version provides that a judicial candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . ." ABA Model Code of Judicial Conduct, Canon 5 A(3)(d)(ii). Plaintiffs would ask this Court to find that the fact that the ABA was compelled to change the language of the announce clause is evidence that the announce clause in effect in Minnesota is unconstitutional.

The Court acknowledges that in ruling on Plaintiffs' motions for a preliminary injunction, it initially ruled that Plaintiffs had shown a likelihood of success on the merits of its claim that the announce clause is unconstitutional as written. However, upon closer examination of the applicable case law, the Court is convinced that the announce clause is constitutional when narrowly construed.

When determining a facial challenge to a statute, the Court must uphold it if the statute's language is readily susceptible to a narrowing construction that would make it constitutional. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L. Ed. 2d 782 (1988). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Stretton*, at 144 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L. Ed. 2d 645 (1988)). The Court further notes that the Minnesota Supreme Court "[w]hen possible, ... narrowly construes a law subject to a facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression." *In Matter of Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), rev'd on other grounds, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L. Ed. 2d 305 (1992).

Taking these practices into account, this Court finds that the Minnesota Supreme Court would interpret the announce clause narrowly, consistent with the construction urged upon the Court by the Judicial Board. This Court also notes that the announce clause, in its current form, was adopted by the Minnesota Supreme Court in 1974. Since that time, there have been many contested elections for judicial seats during which there was robust public discussion as to the candidate's qualification.[10] Thus, contrary to Plaintiffs' arguments, there is no evidence that the announce clause has had a chilling effect on the First Amendment rights of judicial candidates in the past.

---

[10] A good example of such an election occurred in 1978, when Associate Justice Rosalie Wahl, the first woman to sit on the Minnesota Supreme Court, was challenged for the seat of Associate Justice by former Attorney General Robert Mattson Sr., Olmstead County District Court Judge Dan Foley and Ramsey County District Judge Jerome Plunkett.

In conclusion, by interpreting the announce clause as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, the announce clause serves the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech.

IT IS HEREBY ORDERED THAT:

1. The motions of Defendants Judicial Board and the Lawyers Board and the Office of Professional Responsibility for Summary Judgment [Docket Nos. 96 and 99] are GRANTED in their entirety. Plaintiffs' Complaint is hereby DISMISSED with prejudice.
2. The Plaintiffs' Motion for Summary Judgment [Docket No. 48] is DENIED in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPUBLICAN PARTY OF MINNESOTA, AN ASSOCIATION; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA; REPUBLICAN SENIORS, AN ASSOCIATION; YOUNG REPUBLICAN LEAGUE OF MINNESOTA, A MINNESOTA NONPROFIT CORPORATION; MINNESOTA COLLEGE REPUBLICANS, AN ASSOCIATION; GREGORY F. WERSAL, INDIVIDUALLY; CHERYL L. WERSAL, INDIVIDUALLY; MARK E. WERSAL, INDIVIDUALLY; CORWIN C. HULBERT, INDIVIDUALLY; CAMPAIGN FOR JUSTICE, AN ASSOCIATION; MINNESOTA AFRICAN AMERICAN COUNCIL, AN ASSOCIATION; MUSLIM REPUBLICANS, AN ASSOCIATION,

APPELLANTS,

v.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, OR HER SUCCESSOR; CHARLES E. LUNDBERG, IN HIS CAPACITY AS CHAIR OF THE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, OR HIS SUCCESSOR; EDWARD J. CLEARY, IN HIS CAPACITY AS DIRECTOR OF THE MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY, OR HIS SUCCESSOR,

APPELLEES.

No. 98-1625

Submitted: Oct. 19, 1998
Filed: Nov. 2, 1998

McMILLIAN, FAGG, and BEAM, JJ.

Gregory F. Wersal, a licensed Minnesota attorney and candidate for the position of Associate Justice of the Minnesota Supreme Court, together with his campaign committee, Campaign for Justice, his wife, Cheryl L. Wersal, his brother, Mark Wersal, one of his supporters, Corwin C. Hulbert, the Minnesota Republican Party (MRP), and associations affiliated with the MRP (collectively plaintiffs), appeal from an order of the United States District Court[1] for the District of Minnesota denying their motion for a temporary restraining order or preliminary injunction in their action against the Chair of the Minnesota Board of Judicial Standards, the Chair of the Minnesota Lawyers Professional Responsibility Board, and the Director of the Office of Lawyers Professional Responsibility. *Republican Party of Minnesota v. Kelly*, No. 98- 831 (D. Minn. Mar. 9, 1998) (memorandum opinion and order). Plaintiffs brought this civil action, and moved for injunctive relief, based upon the assertion that certain provisions of Canon 5 of the Minnesota Judicial Code, as amended on December 23, 1997, violate their rights under the free speech, free association, and equal protection clauses of the United States and Minnesota Constitutions. Jurisdiction was proper in the district court based upon 28 U.S.C. § 1331. Jurisdiction is proper in this court based upon 28 U.S.C. § 1292. Upon careful consideration of the record in the present case and the arguments presented on appeal, we hold that the district court did not abuse its discretion in denying plaintiffs' motion for a temporary restraining order or preliminary injunction under the standard set forth in *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc). At this stage of the litigation, we express no opinion on the merits of plaintiffs' claims. The order of the district court is affirmed. *See* 8th Cir. R. 47B.

---

[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

BEAM, J., dissenting.

I dissent because the district court should have ordered a preliminary injunction on at least part of the claims asserted.

APPENDIX J

UNITED STATES DISTRICT COURT, D. MINNESOTA

REPUBLICAN PARTY OF MINNESOTA, ET AL.,
PLAINTIFFS,

v.

VERNA KELLY, IN HER CAPACITY AS CHAIRPERSON OF THE MINNESOTA BOARD OF JUDICIAL STANDARDS, ET AL.,
DEFENDANTS.

No. 98-831(MJD)

March 9, 1998

MEMORANDUM OPINION AND ORDER

DAVIS, District Judge.

Plaintiffs move for an order pursuant to Rules 65(a) and 65(b) of the Federal Rules of Civil Procedure, enjoining the Minnesota Lawyers Professional Responsibility Board, the Minnesota Office of Lawyers Responsibility and the Minnesota Board of Judicial Standards from enforcing sections of Canon 5 of the Code of Judicial Conduct (the "Judicial Codes") which prohibit judicial candidates from exercising their rights of free speech and free association guaranteed under the First Amendment.

Background

1. The Plaintiffs

Plaintiff Gregory F. Wersal ("Wersal") is an attorney licensed to practice law within the state of Minnesota. In 1996, he was a judicial candidate for the position of Associate Justice of the Minnesota Supreme Court. Wersal states that he will also seek this position in 1998. Wersal's campaign committee, Campaign for Justice is also a named party in the present action before the Court. Also named as plaintiffs are Cheryl L. Wersal, wife of Greg Wersal, and Mark Wersal, Greg Wersal's brother. Corwin C. Hulbert is also a named plaintiff, as an unsolicited advocate of Wersal and his endorsement by the Republican Party and its Affiliated Associations, also named plaintiffs.

Plaintiffs state that during his 1996 campaign, the Campaign for Justice, as well as Wersal's wife, brother and members of the Republican party or an Affiliated Association, engaged or participated in one or more of the following types of speech or association on Wersal' behalf: attended gatherings of the Republican party and its affiliated associations and distributed campaign literature and spoke at such gatherings; announced that Wersal was in favor of a strict construction of the Constitution and was critical of certain decisions of the Minnesota Supreme Court; identified Wersal as a member of the Republican party; sought the Republican party's endorsement for Wersal; and solicited campaign contributions.

Also during Wersal's 1996 campaign, an individual filed a Complaint with the Minnesota Office of Lawyers Professional Responsibility ("MOLPR") against Wersal, alleging violations of Canon 5 of the Judicial Codes. The Complaint was investigated and dismissed by the MOLPR.

On December 23, 1997, the Minnesota Supreme Court amended sections of Canon 5 of the Judicial Codes. Plaintiffs argue that as a result of these amendments, Wersal and others on acting on his behalf, are prevented from engaging in the type of conduct described above, such as attending gatherings of the Republican party or its affiliated associations.

2. History of Canon 5 of the Judicial Codes

The Judicial Codes have included provisions regulating the conduct of judicial candidates in judicial elections since at least 1974. 52 M.S.A., Code of Judicial Conduct (1993). In the earlier version of the Judicial Codes, Canon 7 directed that judicial candidates should not do the following: make speeches for a political organization, Canon 7(A)(1)(b) (1993), solicit funds or make contributions to political organizations, or attend political gatherings, Canon 7(A)(1)(c), or engage in any other political activity except on behalf of measures to improve the law, the legal system, judicial administration or the administration of justice. Canon 7(A)(4). Canon 7 also directed that judicial candidates should maintain the dignity appropriate to judicial office and should encourage family, and employees or public officials subject to the candidate's control from doing what the candidate could not do. Canon 7(B)(1)(a) and (b) (1993). Also in the previous version of the Codes, judicial candidates were directed not to make pledges or to "announce his or her views on disputed legal or political issues" Canon 7(B)(c) (1993).

In 1995, the Judicial Codes addressing the regulation of judicial candidates were amended and are now addressed in Canon 5. Canon 5 was again amended on December 23, 1997, by adding language to clarify ambiguities that resulted from the 1995 amendments. The Sections of Canon 5 relevant to this motion, in its present form, is provided below, with the December 1997 amendments underscored:

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06, Subd. 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) (a) act as a leader or hold any office in a political organization; *identify themselves as members of a political organization; except as necessary to vote in an election*;

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; *or seek, accept or use endorsements from a political organization*; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

* * * * * *

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidates behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except as otherwise permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(*l*) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent;

* * * * * *

B. (1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings, *other than political organization gatherings, on his or her own behalf;*

* * * * * *

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, *but shall not seek, accept or use political organization endorsements.* Such committees shall not disclose to the candidate the

identity of campaign contributors *nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.* A candidate shall not use or permit the use of campaign contributions for the private benefits of the candidate or others.

* * * * * *

D. Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.

* * * * * *

3. Plaintiffs' Claims

In their Complaint, Plaintiffs have asserted five separate claims. In Count One, Plaintiffs allege that the prohibitions against judicial candidates, their families and others acting on the candidate's behalf, from attending and speaking at political gatherings, *See* Canon 5A(1) and B(1), infringes upon their rights to freedom of speech and association, as guaranteed them under the United States and Minnesota Constitutions. Complaint ¶ 35. Plaintiffs also allege that this prohibition violates the equal protection clauses of the United States and Minnesota Constitutions, as the Judicial Codes' definition of political organization affects political organizations such as the Republican Party, but no "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association or MADD. *Id.* ¶ 40. In Count II, Plaintiffs allege that the ban on judicial candidates from announcing their views on disputed legal or political issues, *See* Canon 5A(3), violates the individual plaintiffs' freedom of speech. *Id.* ¶¶ 42 and 61. Counts III and IV, assert claims involving the violation of the rights of freedom of speech, freedom of association and equal protection, as a result of the Judicial Codes ban on judicial candidates identifying their political party. *See*, Canon 5A(1), *Id.* ¶ 62 and the ban on seeking, accepting or using political party endorsements, *See*, Canon 5A(1) and B(2). *Id.* ¶ 79. The last count, Count V, asserts the Judicial Codes' ban on judicial candidates personally soliciting campaign contributions, *See*, Canon 5B(2), is a violation of the right to freedom of speech. *Id.* ¶ 102.

4. Motion for Temporary Restraining Order and/or Preliminary Injunction

On March 3, 1998, precinct caucuses will be held throughout the state of Minnesota. Plaintiffs seek the above-referenced injunctive relief in order to fully exercise their constitutional rights of freedom of speech and freedom of association, without the threat of sanctions against Wersal at meetings of the Republican Party, including the precinct caucuses, the April 1998 Basic Political Organizational United Conventions, the May 1998 Congressional District Conventions and the June 1998 State Convention, as well as meetings of the affiliated associations.

Standards for Injunctive Relief

The Eighth Circuit has established that the following factors are to be used when considering a motion for preliminary injunctive relief:

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); *accord Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1090 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982).

1. Success on the merits

In their Complaint, the Plaintiffs present the Court with several claims involving the infringement of their fundamental rights to freedom of speech, freedom of association and equal protection under the law. In order to obtain the injunctive relief they seek, Plaintiffs must establish that the relevant sections of Canon 5 of the Judicial Codes are not narrowly tailored to serve a compelling state interest. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 141-142 (3rd Cir. 1991).[1] In response to the allegations of Plaintiffs, the Defendants respond that the state of Minnesota has a compelling state interest in maintaining the independence and impartiality of the judiciary, and that the Judicial Codes are narrowly tailored to serve such interest.

In its limited opportunity to review the applicable case law, the Court finds that the state of Minnesota does have a compelling interest in maintaining the independence and impartiality of the judiciary. *See, e.g. Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977). In order to reach a determination on the merits of the claims presented, this Court must reconcile the conflicts between the constitutionally guaranteed rights at issue in this case and the compelling interests of the state in regulating judicial elections. *Buckley v. Illinois*, 997 F.2d 224, 227 (7th Cir. 1993).

> Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. The roots of both principles lie deep in our constitutional heritage. Justice under law

---

[1] The Defendants assert that other standards may be applicable to the constitutional challenges presented by Plaintiffs in their Complaint. For the purposes of this motion, however, the Defendants will not dispute that the strict scrutiny standard is applicable.

> is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time. Whatever their respective pedigrees, only a fanatic would suppose that one of the principles should give way completely to the other—that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank and serial number.

Id.

Because the conflicting interests involved in this case are of great import, the Court will hesitantly address the likelihood the Plaintiffs will succeed on the merits of their claims, given the limited time frame in which the Court was asked to decide Plaintiffs' motion.

In support of their claim that the "announce" rule contained in Canon 5A(3)(d)(*l*) infringes upon their right to freedom of speech, Plaintiffs note that three courts have already held similar language unconstitutionally overbroad and vague. *See, Buckley, supra*; *Beshear v. Butt et al.*, 863 F. Supp. 913 (E.D. Ark. 1994); *American Civil Liberties Union of Florida v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990). The Defendants point out, however, that at least one court has held similar language constitutional. *Stretton*, 944 F.2d at 144. Defendants also argue that the announce rule does not prohibit judicial candidates from discussing or stating their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience. *Bundlie v. Christensen*, 276 N.W.2d 69, 72

(Minn. 1979). Thus, contrary to the finding of the court in *Buckley*, the Judicial Codes do not prevent candidates from discussing more than their name, rank and serial number.

The Court has reviewed the law cited by the parties in their briefs, and *at this time*, finds that those cases holding the "announce" rule unconstitutionally overbroad are more persuasive. Thus, Plaintiffs have established a likelihood of success on the merits as to Count Two.

The case law is not so clear with regard to the remaining Counts in the Complaint which involve the prohibitions against political activity by judicial candidates. Plaintiffs have not presented the Court with any cases that directly support their position on these remaining counts. Rather, in reviewing the relevant sections of Canon 5, the Court finds such sections appear to be narrowly tailored to serve the compelling state interest of maintaining the independence and impartiality of the judiciary. At this time, the Court thus finds that Plaintiffs have not established a likelihood of success on the merits as to Counts I, III, IV and V.

2. Irreparable Harm

The Defendants concede that an infringement of constitutional rights would constitute irreparable harm. *See*, Memorandum of Defendant Verna Kelly, page 4, n. 2. The Defendants argue, however, that the harm suffered by not allowing Plaintiffs to attend caucuses on March 3, 1998 would be slight in comparison to the harm to the public interest. The Court will thus proceed to the next factor, balance of hardships.

3. Balance of Hardships

In their brief, and in the arguments of counsel, Plaintiffs assert that the claims at issue in this case arose as a result of the December 23, 1997 amendments to Canon 5. For the most part, this is simply not the case. In fact, the only substantive changes that resulted from the December 1997 amendments were the addition of prohibitions against judicial candidates from identifying themselves as a member of a political party, and the prohibition against seeking, accepting or using a political party's endorsement. The prohibitions against attending and speaking at political gatherings, announcing views on disputed legal or political issues, and personally soliciting funds have been in place for a number of years. Given this fact, the Court finds that the balance of harm weighs against granting Plaintiffs' motion for injunctive relief.

The Defendants have established that the state has a compelling interest in maintaining an independent and impartial judiciary. The relief sought will upset and derail the status quo as to such compelling state interests. As noted above, Plaintiffs have failed to establish a likelihood of success on the merits as to their claims, with the exception of the claim involving the announce rule. By granting the relief sought, no backup rules exist which would protect the state's compelling interests. With no regulations in place, judicial candidates will be given the opportunity to essentially turn the non-partisan judicial election process into a partisan one. Once that happens, the effects are irreversible. On the other hand, by maintaining the status quo and protecting the state's interest in maintaining a non-partisan judicial process for such time as is necessary to allow the Court to carefully consider the issues before it, the harm to the Plaintiffs is minimal as there are many more opportunities for them to receive political endorsements than just the March 3, 1998 caucuses.

4. Public Interest

For the reasons stated above, this factor also weighs against granting the injunctive relief sought, given the state's compelling interest in maintaining an independent and impartial judiciary.

IT IS HEREBY ORDERED that Plaintiffs' Motion for a Temporary Restraining Order and/or for Preliminary Injunctive Relief is DENIED.

APPENDIX K

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amend. I.

2. Canon Five of the Minnesota Code of Judicial Conduct, 52 Minn. Stat. Ann., Code of Jud. Cond., Canon 5 (West 2005), provides in relevant part:

* * *

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. In General.

Each justice of the Supreme Court and each Court of Appeals and district court judge is deemed to hold a separate nonpartisan office, Minn. Stat. § 204B.06, subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election;

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or seek, accept, or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign the judicial office on becoming a candidate either in a primary or in a general election for a non-judicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

  (i) with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office; or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, expressed position or other fact concerning the candidate, or an opponent; or

  (ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

(e) may respond to statements made during a campaign for judicial office within the limitations of Section 5A(3)(d).

B. Judges and Candidates for Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

  (a) speak to gatherings, other than political organization gatherings, on his or her own behalf;

  (b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

  (c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such

committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

C. Incumbent Judges.

A judge shall not engage in any political activity except (1) as authorized under any other Section of this Code, (2) on behalf of measures to improve the law, the legal system or the administration of justice, or (3) as expressly authorized by law.

D. Political Organizations.

For purposes of Canon 5 the term "political organization" denotes an association of individuals under whose name a candidate files for partisan office.

E. Impartiality.

"Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

F. Candidate.

"Candidate" is a person seeking selection for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election to nonjudicial office.

G. Applicability.

Canon 5 applies to all judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.

APPENDIX L

SELECTED STATE ETHICS CODES

1. Canon Seven of the Alabama Canons of Judicial Ethics, Ala. Rules of Court, Canons of Jud. Ethics, Canon 7 (West 2005), provides in relevant part:

Canon 7

A Judge or a Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

* * *

A. Political Conduct in General.

(1) A judge or a candidate for election to a judicial office shall endeavor at all times to refrain from political activities inappropriate to the judicial office that he or she holds or seeks. It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than a candidate for a judicial office and not be involved in political fund solicitations other than for himself or herself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself or herself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his or her election or re election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he or she at all times conduct himself or herself in such a manner as to prevent any political considerations, entanglements, or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

(2) A judge shall resign his or her office when the judge becomes a candidate either in a political primary or in a general election for nonjudicial office, except that the judge may continue to hold judicial office while being a candidate for election to any judicial office or while being a candidate for election to a state constitutional convention or commission.

* * *

B. Campaign Conduct.

* * *

(4) *Campaign Financing.*

(a) A candidate is strongly discouraged from personally soliciting campaign contributions. It is highly recommended that a candidate establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept campaign contributions and public support from lawyers.

(b) Contributions to a judge's or a candidate's campaign shall be neither solicited nor accepted more than one year prior to the election in which the candidate participates as a candidate for judicial office or more than 120 days after that election.

(c) Candidates shall file reports as required by the Alabama Fair Campaign Practices Act.

* * *

2. Canon Five of the Alaska Code of Judicial Conduct, Alaska Court Rules, Code of Jud. Conduct, Canon 5 (West 2006), provides in relevant part:

Canon 5. A Judge Or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

C. Judges Seeking Retention.

(1) A judge who is a candidate for retention in judicial office may engage in the following political activity to secure retention:

* * *

(b) in response to an unsolicited request,

(i) speak to public gatherings on behalf of his or her candidacy;

* * *

(c) form an election committee of responsible persons to conduct an election campaign in case there is active opposition to the judge's candidacy; and

* * *

(2) A Judge who is a candidate for retention in judicial office may engage in the following additional political activity when there is active opposition to the judge's candidacy:

(a) advertise in newspapers, on television, and in other media in support of his or her candidacy; and

(b) distribute pamphlets and other promotional literature supporting his or her candidacy.

* * *

(3) A judge who is a candidate for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy. However, if there

is active opposition to the judge's candidacy, the judge's election committees may engage in media advertisements, brochures, mailings, candidate forums, and any other legal methods of pursuing the judge's election. Such committees may solicit and accept reasonable campaign contributions, manage and expend these funds on behalf of the judge's election campaign and solicit and obtain public statements of support for the judge's candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committee may solicit contributions and public support for the candidate's campaign preceding the election and for 90 days thereafter. A judge shall not make private use of campaign funds raised by an election committee or use these funds for the private benefit of any other person or permit anyone else to use these funds for the private benefit of any person.

* * *

3. Canon Five of the Arizona Code of Judicial Conduct, 17A Ariz. Rev. Stat. Ann., Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

(2) A judge or a non-judge who is a candidate for judicial office may speak to political gatherings on his or her own behalf.

(3) A judge may purchase tickets for political dinners or other similar functions but attendance at any such functions shall be restricted so as not to constitute a public endorsement of a candidate or cause otherwise prohibited by these canons.

* * *

B. Judicial Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit selection system or retention election:

* * *

(2) A candidate, including an incumbent judge, for a judicial office, whether by a contested election or seeking the retention of the office according to law, shall comply with the Arizona statutes relating to the financial aspects of the candidacy. All candidates should refrain from personally soliciting campaign contributions. They should refer prospective contributors to the candidate's campaign committee.

(3) An incumbent judge who is a candidate for retention in or re-election to office may campaign for retention in or re-election to office; may obtain publicly stated support; and

in the manner provided in subsection B(2) may obtain campaign funds.

* * *

4. The Arkansas Code of Judicial Conduct, Ark. Code Ann., Code of Judicial Conduct, Terminology & Canon 5 (Lexis Nexis 2005), provides in relevant part:

"Political organization" denotes a group other than a political party, a purpose of which is to participate in the political process.

"Political party" has the same meaning as provided in Ark. Code Ann. § 7-1-101(16)(A), that is, "any group of voters which at the last-preceding general election polled for its candidate for Governor in the state or nominees for presidential electors at least three percent (3%) of the entire vote cast for the office." In the case of a newly organized political party, the term "political party" shall mean a party that satisfies the requirements contained in Ark. Code Ann. § 7-3-108(b).

* * *

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. *All Judges and Candidates*

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

* * *

(d) directly or indirectly seek or use endorsements from a political party;

* * *

(f) publicly identify his or her current political party affiliation or lend one's name to a political party.

* * *

C. *Judges and Candidates Subject to Public Election.*

(1) A judge, or a candidate subject to public election may, except as prohibited by law:

(a) at any time

* * *

(i) speak to gatherings on his or her own behalf and may speak at gatherings of political organizations or political parties where all opposing judicial candidates for the same office have the opportunity to speak;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support other than from political organizations parties for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.

A candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than 180 days before an election and no later than 45 days after the last contested election in which the candidate participates during the election year. Funds received prior to the 180 day limitation or after the 45 day limitation shall be returned to the contributor. If funds are received personally by a judicial candidate, the candidate shall promptly turn them over to the campaign committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others. Any campaign fund surplus shall be returned to the contributors or turned over to the State Treasurer as provided by law.

* * *

(3) A candidate for judicial office in a public election may not directly or indirectly solicit or promote the candidate's name to appear in promotions on a political

party's ticket or materials paid for by a political party. Except as prohibited by law, a candidate's name, picture or other identifying information may be listed in election material sponsored by a political organization.

* * *

5. Canon Five of the California Code of Judicial Ethics, Cal. Rules of Court, Code of Jud. Ethics, Canon 5 (West 2005), provides in relevant part:

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

C. Speaking at Political Gatherings. Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

* * *

6. Canon Seven of the Colorado Rules of Judicial Discipline, Colo. Court Rules Ann., Ch. 24, Colo. Rules of Jud. Discipline, Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

CANON 7. A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS OR HER JUDICIAL OFFICE

A. Political Conduct in general.

(1) A judge shall not:

* * *

(c) Solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political partisan gatherings, or purchase tickets for political party dinners or other similar functions;

* * *

B. Campaign Conduct.

* * *

(2) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

(a) The judge may speak at public meetings;

* * *

(c) A nonpartisan citizens' committee or committees advocating the judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;

(d) Any committee organized pursuant to subsection B(2)(c) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses; and,

(e) The judge should not be advised of the source of funds raised by the committees.

* * *

7. Canon Seven of the Florida Code of Judicial Conduct, Fla. Stat. Ann., Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

Canon 7. A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity

* * *

C. Judges and Candidates Subject to Public Election.

(1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

(2) A candidate for merit retention in office may conduct only limited campaign activities until such time as the judge certifies that the judge's candidacy has drawn active opposition. Limited campaign activities shall only include the conduct authorized by subsection C(1), interviews with reporters and editors of the print, audio and visual media, and appearances and speaking engagements before public gatherings and organizations. Upon mailing a certificate in writing to the Secretary of State, Division of Elections, with a copy to the Judicial Qualifications Commission, that the judge's candidacy has drawn active opposition, and specifying the nature thereof, a judge may thereafter campaign in any

manner authorized by law, subject to the restrictions of subsection A(3).

(3) A judicial candidate involved in an election or reelection, or a merit retention candidate who has certified that he or she has active opposition, may attend a political party function to speak in behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice. The function must not be a fund raiser, and the invitation to speak must also include the other candidates, if any, for that office. The candidate should refrain from commenting on the candidate's affiliation with any political party or other candidate, and should avoid expressing a position on any political issue. A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party, a political issue, or another candidate. Conduct limited to that described above does not constitute participation in a partisan political party activity.

* * *

8. Canon Seven of the Georgia Code of Judicial Conduct, Ga. Code Ann., State Court Rules, Ga. Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

CANON 7. JUDGES SHALL REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO THEIR JUDICIAL OFFICE

A. Political Conduct in General.

* * *

(2) Judges holding an office filled by public election between competing candidates, or candidates for such office, may attend political gatherings and speak to such gatherings on their own behalf when they are candidates for election or re-election.

* * *

B. Campaign Conduct.

(1) Candidates, including an incumbent judge, for any judicial office that is filled by public election between competing candidates:

* * *

(2) Candidates, including an incumbent judge, for a judicial office that is filled by public election between competing candidates, may personally solicit campaign contributions and publicly stated support. Candidates, including incumbent judges, should not use or permit the use of campaign contributions for the private benefit of themselves or members of their families.

* * *

9. Canon Five of the Idaho Code of Judicial Conduct, Idaho Rules of Court, Code of Jud. Conduct, Canon 5 (West 2001), provides in relevant part:

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2) and 5C(1), a judge or candidate* for election or appointment to judicial office shall not:

* * *

> (d) publicly endorse or seek the endorsement of a political organization; or

* * *

(2) A judge may attend political gatherings as long as by doing so the judge is not endorsing or seeking the endorsement of a political organization. A judge may speak at political gatherings concerning matters of law, the legal system or the administration of justice.

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or candidate* subject to public election* may, except as prohibited by law*:

> (a) when a candidate for election
>
> > (i) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not solicit or accept campaign contributions in person. A candidate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for

the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than [one year] before election and no later than [90] days after the last election in which the candidate participates during the election year. Except as required by law, a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

10. Illinois Supreme Court Rule 67, Canon 7, Ill. Comp. Stat. Ann, Code of Jud. Conduct, S. Ct. Rule 67, Canon 7 (West 2005), provides in relevant part:

Canon 7.

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

B. Authorized Activities for Judges and Candidates.

(1) A judge or candidate may, except as prohibited by law:

(a) at any time

* * *

(ii) identify himself or herself as a member of a political party; and

* * *

(b) when a candidate for public election

(i) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions. A candidate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for

the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

* * *

11. Canon Five of the Indiana Code of Judicial Conduct, Ind. Code Ann. tit. 34, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3) and 5D, a judge or a candidate for election or appointment to judicial office or retention in judicial office shall not:

* * *

(d) attend a gathering of a political organization;

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election, except as prohibited by law, may at any time:

(a) attend a gathering of a political organization and purchase a ticket for the gathering for the judge and the judge's guest;

(b) identify himself or herself as a member of a political party;

* * *

(d) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees or responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not pro-

hibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one (1) year before an election and no later than ninety (90) days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

(3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

* * *

12. Canon Seven of the Iowa Code of Judicial Conduct, Iowa Code Ann. ch. 51, Code of Jud. Conduct, Canon 7 (West 2002), provides in relevant part:

Canon 7. A Judge Should Refrain From Political Activity Inappropriate to the Judicial Office

A. *Political Conduct in General.*

(1) A judge should not:

* * *

(b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) Solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

* * *

B. *Campaign Conduct.*

* * *

(2) A judge who is a candidate for retention in office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may establish committees of responsible persons to obtain publicly stated support and campaign funds.

* * *

13. Kansas Supreme Court Rule 601A, Kan. Sup. Ct. Rules, Rule 601A, Canon (West 2002), provides in relevant part:

Rules of the Supreme Court of Kansas, Rule 601A. Code of Judicial Conduct

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1), 5C(3), and 5C(4), a judge or a candidate for election or appointment to judicial office shall not:

* * *

(d) attend political gatherings; or

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election may, except as prohibited by law:

(a) at any time

* * *

(ii) identify himself or herself as a member of a political party; and

* * *

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support nor shall a candidate serve as his or her own campaign treasurer. A candidate subject to public election* may, however, establish committees of responsible persons to solicit and accept reasonable campaign contributions, to

manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

(3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

* * *

14. Canon Five of the Kentucky Code of Judicial Conduct, Ky. Rev. Stat. Ann., S. Ct. R. 4.300, Ky. Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

CANON 5: A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

* * *

B. Campaign Conduct.

* * *

(2) A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy. A candidate's committees may solicit funds for the campaign no earlier than 180 days before a primary election. A candidate's committees may not solicit funds after a general election (See KRS 121.150). A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or a member of the candidate's family.

* * *

15. Canon Seven of the Louisiana Code of Judicial Conduct, La. Rev. Stat. Ann., Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

Canon 7

A Judge Or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

C. A Judge or a Judicial Candidate May:

(1) At any time

(a) attend political gatherings;

(b) identify himself or herself as a member of a political party;

* * *

D. Campaign Committees

(1) A judge or judicial candidate shall not personally solicit or accept campaign contributions. A judge or judicial candidate may personally solicit publicly stated support.

(2) A candidate may also establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. However, no undue pressure or coercion may be applied in such solicitation.

(3) Such committees are not prohibited from soliciting or accepting campaign contributions or public support from lawyers. A candidate's committee may solicit contributions for the candidate's campaign no earlier than two years before the primary election. Contributions may be solicited after the last election in which the candidate participated only for the purpose of extinguishing the campaign debt resulting from that election. After the campaign debt is

extinguished, post election campaign contributions may not be solicited or accepted.

* * *

16. Canon Five of the Maine Code of Judicial Conduct, Me. Rules of Court, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

Canon 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. Political Conduct of Incumbent Judges.

(1) A judge shall not:

* * *

(d) attend political gatherings;

* * *

C. Political Conduct of Candidates for Election as Judge of Probate.

(1) A candidate for election or reelection as judge of probate shall comply with the applicable provisions of subsection A(1) and the provisions of section B of this Canon, except as provided in subsections C(2)-(4) of this Canon.

(2) A candidate for election or reelection as judge of probate may, while a candidate,

(a) speak to gatherings on his or her own behalf;

* * *

(3) A candidate for election or reelection as judge of probate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibi-

ted from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

17. Canon Five of the Maryland Code of Judicial Conduct, Md. Code Ann.. Rule 16-813, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

Canon 5. Political Activity

* * *

B. Political Conduct of Judge Who Is Candidate.

(1) A judge who is a candidate for election or re-election to or retention in a judicial office may engage in partisan political activity allowed by law with respect to such candidacy, except that the judge;

* * *

18. Canon Seven of the Michigan Code of Judicial Conduct, Mich. Comp. Laws Ann., Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

CANON 7.

A Judge or a Candidate for Judicial Office Should Refrain From Political Activity Inappropriate to Judicial Office

A. Political Conduct in General.

* * *

(2) A judge or candidate for judicial office may:

(a) attend political gatherings;

* * *

B. Campaign Conduct.

* * *

(2) These provisions govern a candidate, including an incumbent judge, for a judicial office:

(a) A candidate should not personally solicit or accept campaign funds, or solicit publicly stated support by improper use of the judicial office in violation of B(1)(c). A judge may send a thank-you note to a contributor.

(b) A candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.

(c) Such committees are prohibited from soliciting campaign contributions from lawyers in excess of $100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than $100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card:

"Canon 7 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than $100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than $100."

(d) A candidate's committee may not directly or indirectly accept funds from any committee that was established in connection with the candidate's attempt to secure any other judicial or nonjudicial office. The committee may solicit funds for the campaign no earlier than February 15 of the year of the election, and may not solicit or accept funds after the date of the general election.

* * *

19. Canon Five of the Mississippi Code of Judicial Conduct, Miss. Rules of Court, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

CANON 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1), and 5C(2), a judge or candidate for election shall not:

* * *

> (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other political functions.

* * *

C. Candidates Subject to Public Election

(1) Judges holding an office filled by public election between competing candidates, or candidates for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings in their own behalf while candidates for election or re-election, identify themselves as members of political parties and contribute to political parties or organizations.

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign

contributions and public support from lawyers. A candidate's committees shall not solicit or accept contributions and public support for the candidate's campaign earlier than 60 days before the qualifying deadline or later than 120 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

20. Canon Five of the Missouri Code of Judicial Conduct, Mo. Rules of Court, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

2.03, Canon 5. A Judge and Certain of the Judge's Employees Shall Refrain From Inappropriate – Political Activity

A. Political Conduct in General

* * *

(2) Where it is necessary that a judge be nominated and elected as a candidate of a political party, an incumbent judge or candidate for election to judicial office may attend or speak on the judge or candidate's own behalf at political gatherings and may make contributions to the campaign funds of the party of choice. However, neither the judge nor the candidate shall accept or retain a place on any party committee or act as party leader or solicit contributions to party funds.

* * *

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of the non-partisan court plan:

* * *

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds, but the candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign. Such committees are not prohibited from soliciting campaign contributions. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

(3) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Canon 5B(2).

* * *

21. Canon Five of the Nebraska Code of Judicial Conduct, Neb. Court Rules & Procedure, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

CANON 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

C. Judges Subject to Retention Election.

(1) A judge or a candidate subject to retention election may, except as prohibited by law, when the judge's candidacy has drawn active opposition:

(a) purchase tickets for and attend political gatherings;

* * *

(c) speak to gatherings on his or her own behalf;

* * *

(2) A judicial candidate for retention election whose candidacy has drawn active opposition shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A judicial candidate for retention election whose candidacy has drawn active opposition may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than six months before an election and no later than 30 days after the last election in which the candi-

date participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

22. Canon Five of the Nevada Code of Judicial Conduct, Nev. Rev. Stat. Ann., S. Ct. Rules, Part VI, Code of Jud. Conduct, Canon 5 (West 2004), provides in relevant part:

CANON Five. A judge or judicial candidate shall refrain from inappropriate political activities

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election may, except as prohibited by law:

* * *

(ii) upon request, identify himself or herself as a member of a political party; and

* * *

(2) A candidate may personally solicit or accept campaign contributions in accordance with the law or personally solicit publicly stated support. However, where practicable, a candidate is encouraged to use committees of responsible persons to solicit and accept such lawful contributions and conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may also manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidate. A candidate and a candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than 240 days before the primary election, and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

23. Rule 21-800 of the New Mexico Court Rules, N.M. Rules Ann. 21-800, (2005), provides in relevant part:

Rule 21-800. A Judge Shall Refrain From Campaign Fund-Raising Activity Which Has the Appearance of Impropriety.

A. **Contributions Creating Appearance of Impropriety.** Candidates for judicial office in both partisan and retention elections shall refrain from campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety.

B. **Solicitation for Other Campaigns and Candidates.** Subject to the restrictions of this rule, candidates in both partisan and retention elections for judicial office may solicit contributions for their own campaigns, but shall not solicit funds for any other political campaign, or for any candidate for any other office. Judicial candidates may run for election as part of a slate of judicial candidates and may participate in joint fund-raising events with other judicial candidates.

C. **Campaign committees.** Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable campaign contributions, and obtain public statements of support in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

D. **Unopposed Candidates in Partisan Elections.** Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known.

* * *

F. **Contributions by Attorneys and Litigants.** Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. Contributions from attorneys and litigants shall be made only to a campaign committee, and are subject to all the requirements of this rule. Campaign committees may solicit contributions from attorneys. Campaign committees shall not knowingly solicit a contribution from a litigant whose case is then pending before the candidate. Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee. If a case is pending before any candidate for the judicial office being contested, restrictions of this subparagraph apply to all candidates for that office.

* * *

24. Canon Five of the New York Code of Judicial Conduct, N.Y. Judiciary Law, App., N.Y. Code of Judicial Conduct, Canon 5 (McKinney 2003), provides in relevant part:

CANON 5

A Judge or Candidate for Elective Judicial Office Shall Refrain from Inappropriate Political Activity

(A) Incumbent judges and others running for public election to judicial office. (1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

* * *

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

* * *

(g) attending political gatherings;

* * *

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in subdivision (Q) of section 100.0 of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

* * *

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

* * *

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the Window Period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

25. Canon Seven of the North Carolina Code of Judicial Conduct, N.C. Rules of Court, Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

Canon 7

A Judge May Engage in Political Activity Consistent With His Status as a Public Official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

* * *

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

* * *

B. Permissible political conduct. A judge or a candidate may:

* * *

(3) identify himself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he may not personally make financial contributions or loans to any individual seeking election to office (other than himself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

* * *

26. Canon Five of the North Dakota Code of Judicial Conduct, N.D. Court Rules , Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

Canon 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2) and 5C(1), a judge or candidate* for election or appointment to judicial office shall not:

* * *

(d) seek or accept an endorsement or letter of support from a political party;

* * *

(f) purchase tickets for and attend political gatherings.

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election may, except as prohibited by law:

(a) at any time, publicly speak on behalf of his or her own candidacy or on behalf of measures to improve the law, the legal system, or the administration of justice, whether or not at a gathering sponsored by a political organization;

(b) when a candidate for election

(i) appear in newspaper, television and other media advertisements supporting his or her candidacy;

(ii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; or

(iii) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

27. Canon Seven of the Ohio Code of Judicial Conduct, Ohio Rev. Code Ann., Code of Jud. Conduct, Canon 7 (West 2005), provides in relevant part:

Canon 7 Judges And Judicial Candidates Should Refrain From Political Activity Inappropriate to Judicial Office

(A) Definitions

* * *

(6) "Political party" has the same meaning as in section 3517.01 of the Revised Code and includes any national, state, or county political party.

(7) "Organization" means any entity or combination of two or more persons, other than a political party, including, but not limited to, a corporation, nonprofit corporation, partnership, limited liability company, association, professional association, continuing association, estate, trust, business trust, political action committee as defined as in section 3517.01 of the Revised Code, law firm, organization affiliated with a political party, labor organization, campaign committee of another candidate for public office, or caucus campaign committee.

* * *

(10) "Organization affiliated with a political party" means a combination of two or more persons, other than a political party or an organization, that is identified by its name or association with a national, state, or county political party or expressly promotes the interests, philosophy, or candidates of a political party.

* * *

(B) Political and campaign conduct in general

* * *

(3)(a) A judge or judicial candidate may do any of the following:

(iv) From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself in person or in advertising as a member of or affiliated with a political party.

(b) After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party.

* * *

(C) Campaign Solicitations; use of Campaign Funds

* * *

(2)(a) A judicial candidate personally shall not solicit or receive campaign funds. A judicial candidate may establish a committee to secure and manage the expenditure of funds for his or her campaign and to obtain statements of support for his or her candidacy. The campaign committee shall not knowingly receive directly or indirectly for any political or personal purpose any of the following:

(i) A contribution from any employee of the court or person who does business with the court in the form of a contractual or other arrangement in which the person, in the current year or any of the previous six calendar years, received as payment for goods or services aggregate funds or fees regardless of the source in excess of two hundred fifty dollars. The committee may receive campaign contributions from lawyers who are not employees of the court or doing business with the court in the form of a contractual or other arrangement.

(ii) A contribution from any appointee of the court unless the campaign committee, on its campaign contribution and expenditure statement, reports the name, address, occupation, and employer of the appointee, identifies the person as an appointee of the court, and indicates whether the appointee, in the current year or in any of the previous six calendar years, received aggregate compensation from court appointments in excess of two hundred fifty dollars.

(iii) A contribution from a political party unless the contribution is made from a separate fund established by the political party solely to receive donations for judicial candidates and the political party reports on the contribution and expenditure statements filed by the party the name, address, occupation, and employer of each person who contributed to the separate fund established by the political party.

* * *

(3) A judicial candidate shall not participate in or receive campaign contributions from a judicial fund raising event that categorizes or identifies participants by the amount of the contribution made to the event.

(4)(a) The campaign committee of a judicial candidate may begin soliciting and receiving contributions no earlier than one hundred twenty days before the first Tuesday after the first Monday in May of the year in which the general election is held. If the general election is held in 2000 or any fourth year thereafter. the campaign committee of a judicial candidate may begin soliciting and receiving contributions no earlier than one hundred twenty days before the first Tuesday after the first Monday in March of the year in which the general election is held. Except as provided in divisions (C)(4)(b) and (c) of this canon, the solicitation and receipt of contributions may continue until one hundred twenty days after the general election.

* * *

28. Canon Five of the Oklahoma Code of Judicial Conduct, Okla. Stat. Ann., tit. 5, ch. 1, app. 4, Code of Jud. Conduct, Canon 5 (West 2001, supp. 2005), provides in relevant part:

CANON 5. A JUDGE OF JUDICIAL CANDIDATE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or candidate subject to public election may, except as prohibited by law:

(a) speak to gatherings on his or her own behalf;

* * *

(2) A candidate should not personally solicit campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit and/or accept contributions and public support for the candidate's campaign no earlier than 90 days before an election filing period and no later than 30 days after the last election in which the candidate participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

29. Oregon Code of Judicial Conduct Rule 4-102, Or. Code of Jud. Conduct Jud. R. 4-102 (2005), provides in relevant part:

JR 4-102

With respect to any election or appointment for judicial public office, a judicial candidate shall not knowingly:

* * *

(C) Publicly identify the judicial candidate, for the purpose of election, as a member of a political party other than by registering to vote or as allowed by ORS 249.015.

(D) Personally solicit campaign contributions in money or in kind, but a judicial candidate may establish one or more committees to obtain and manage finances, including contributions, and pay expenses to promote the judicial candidate's election.

* * *

30. Canon Seven of the Pennsylvania Code of Judicial Conduct, Pa. Cons. Stat. Ann., Code of Jud. Conduct, Canon 7 (West supp. 2005), provides in relevant part:

Canon 7. A Judge Should Refrain From Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

* * *

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

* * *

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, or speak on behalf of any judicial candidate for the same office, identify himself as a member of a political party, and contribute to a political party or organization.

* * *

B. Campaign Conduct.

* * *

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such

committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than thirty (30) days prior to the first day for filing nominating petitions or the last day for filing a declaration of intention to seek reelection on a retention basis, and all fundraising activities in connection with such judicial campaign shall terminate no later than the last calendar day of the year in which the judicial election is held. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate may campaign and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

* * *

31. Canon Five of the South Carolina Code of Judicial Conduct, S.C. App. Court Rule 501, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

CANON 5. A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

* * *

(d) attend political gatherings; or

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election may, except as prohibited by law:

(a) at any time

(i) purchase tickets for and attend political gatherings;

(ii) identify himself or herself as a member of a political party; and

(iii) contribute to a political organization;

* * *

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such

committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

32. Canon Five of the South Dakota Code of Judicial Conduct, S.D. Codified Laws, ch. 12-16, App., Code of Jud. Conduct, Canon 5 (Lexis Nexis 2005), provides in relevant part:

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

* * *

(d) attend political gatherings; or

* * *

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election may, except as provided by law:

(a) at any time

(i) purchase tickets for and attend political gatherings

(ii) identify himself or herself as a member of a political party for voting purposes only; and

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign

and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than 90 days before a primary election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

(3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of his or her candidacy.

* * *

33. Canon Five of the Tennessee Code of Judicial Conduct, Tenn. Rules of Court, S. Ct. Rule 10, Code of Jud. Conduct, Canon 5 (West 2005), provides in relevant part:

CANON 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

C. Judges and Candidates Subject to Election

(1) A judge or a candidate subject to election may, except as prohibited by law.

(a) at any time

(i) purchase tickets for and attend political gatherings, subject to the limitations in (a)(iii);

(ii) identify himself or herself as a member of a political party; and

* * *

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

* * *

(2)(a) A candidate shall not personally solicit or accept campaign contributions. A candidate may personally solicit publicly stated support and establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign, and may also obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers. A candidate's committees may solicit and accept contributions for the candidate's campaign no earlier than 180 days before an election (see

Commentary below) and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

> (b) Candidates for judicial office must comply with all requirements of state law with regard to campaign finances, including but not limited to, all statutes relating to financial disclosure and campaign contribution limits.

* * *

(3) Except as prohibited by law, a candidate for judicial office in an election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office and (b) to appear in promotions of the ticket.

* * *

34. Canon Five of the Texas Code of Judicial Conduct, Tex. Gov't Code Ann., tit 3A, subtitle G, app. B, Code of Jud. Conduct, Canon 5 (2005), provides in relevant part:

Canon 5. Refraining From Inappropriate Political Activity

* * *

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

* * *

35. Canon Five of the Utah Code of Judicial Conduct, Utah Code of Jud. Admin., ch. 12, Code of Jud. Conduct, Canon 5 (Lexis Nexis 2001), provides in relevant part:

* * *

Canon 5. A Judge Shall Refrain From Political Activity Inappropriate to the Judicial Office.

A. A candidate for selection by a judicial nominating commission shall not engage in political activities that would jeopardize the confidence of the public or of governmental officials in the political impartiality of the judicial branch of government. A candidate for selection to a judicial office shall not:

* * *

A. (3) seek support or invite opposition to the candidacy because of membership in a political party.

* * *

C. If a candidate for judicial office in a retention election or reappointment process has drawn active public opposition, the candidate may operate a campaign for office subject to the following limitations:

* * *

C. (2) The candidate shall not directly solicit or accept campaign funds or solicit publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. Committees may solicit campaign contributions and public statements of support from lawyers and non-lawyers. Surplus contributions held by the committee after the election shall be contributed without public attribution to the Utah Bar Foundation. Committees must not permit the use of campaign contributions for the private benefit of the judge or members of the judge's family.

C. (3) The candidate may speak to public gatherings on the candidate's own behalf.

* * *

36. Canon Seven of the Washington Code of Judicial Conduct, Wash. Ct. Rules, Code of Jud. Conduct, Canon 7 (West 2000), provides in relevant part:

* * *

CANON 7

Judges Shall Refrain From Political Activity Inappropriate to Their Judicial Office

(A) Political Conduct in General.

(1) Judges or candidates for election to judicial office shall not:

* * *

(e) identify themselves as members of a political party, except as necessary to vote in an election;

* * *

(2) During judicial campaigns, judges or candidates for election to judicial office may attend political gatherings, including functions sponsored by political organizations, and speak to such gatherings on their own behalf or that of another judicial candidate.

* * *

(B) Campaign Conduct.

* * *

(2) Candidates, including incumbent judges, for a judicial office that is filled by public election between competing candidates shall not personally solicit or accept campaign contributions. They may establish committees of responsible persons to secure and manage campaign funds and to obtain public statements of support. Such committees may solicit campaign contributions and public support from lawyers and others. Candidates' committees may solicit contributions no earlier than 120 days from the date when filing for that office is first permitted and no later than 60 days after the final election in which the candidate partici-

pated. Candidates shall not use or permit the use of campaign contributions for the private benefit of themselves or members of their families. Candidates shall comply with all laws requiring public disclosure of campaign finances, which may require knowledge of campaign contributions. When an unsolicited contribution is delivered directly to the candidate, receipt and prompt delivery of the contribution to the appropriate campaign official is not prohibited.

* * *

37. Canon Five of the West Virginia Code of Judicial Conduct, W.Va. Code Ann., State Court Rules, Code of Jud. Conduct, Canon 5 (Lexis Nexis 2004), provides in relevant part:

Canon 5. A judge or judicial candidate shall refrain from inappropriate political activity

* * *

C. *Judges and Candidates Subject to Public Election.* — (1) A judge or a candidate subject to public election may, except as prohibited by law:

(a) at any time

* * *

(ii) identify himself or herself as a member of a political party; and

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign, and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* * *

(3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of

other candidates for elective public office, and (b) to appear in promotions of the ticket.

* * *

38. Wisconsin Supreme Court Rule 60, Wis. Code Ann. ch. 60, S.C.R. 60.06 (West 2005), provides in relevant part:

S.C.R. 60.06. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

* * *

(2) Party membership and activities. (a) Individuals who seek election or appointment to the judiciary may have aligned themselves with a particular political party and may have engaged in partisan political activities. Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of a political party.

2. Participate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of a political party of a candidate for partisan office.

* * *

(4) Solicitation and Acceptance of Campaign Contributions. A judge, candidate for judicial office, or judge elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

(5) **Solicitation and Acceptance of Endorsements.** A judge or candidate for judicial office may solicit or accept endorsements supporting his or her election or appointment personally or through his or her committee. A judge, candidate for judicial office, or his or her committee is not prohibited from soliciting and accepting endorsements from lawyers and others. A judge or candidate for judicial office shall not knowingly personally solicit or accept endorsements from parties who have a case pending before the court to which election or appointment is sought. Nevertheless, a judge or judicial candidate may personally solicit or accept endorsements from the types of organizations that ordinarily make recommendations for selection to the office. In soliciting or accepting an endorsement, a judge or candidate for judicial office should be mindful of the requirements of SCR 60.03 and 60.04(4).

* * *

39. Canon Five of the Wyoming Code of Judicial Conduct, Wyo. Court Rules Ann., Code of Jud. Conduct, Canon 5 (Lexis Nexis 2005) provides in relevant part:

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. *All Judges and Candidates.*—

(1) Except as authorized in Sections 5B(2) and 5C(1), a judge or candidate for election or appointment to judicial office shall not:

* * *

(d) attend political gatherings; or

* * *

C. *Judges and Candidates Subject to Public Election.*—

(1) A judge or a candidate subject to public election may,

(a) at any time

(i) purchase tickets for and attend political gatherings;

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

* * *

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and

public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 30 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(8)

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

No. 05-566

In The

Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*, *Petitioners*,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

William F. Mohrman
Erick G. Kaardal
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, MN 55402
612/341-1074
612/341-1076 (facsimile)
Counsel for Gregory Wersal, Campaign for Justice, Kevin J. Kolosky

James Bopp, Jr.
Counsel of Record
Thomas J. Marzen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Counsel for Republican Party of Minnesota, Indian Asian American Republicans of Minnesota (client list continued on inside cover)

Jan. 3, 2005

Bopp, Coleson & Bostrom client list continued from cover: *Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republican, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hilbert, and Michael Maxim.*

Questions Presented

Minnesota selects its judges through a system of nonpartisan elections. Canon 5 of the Minnesota Code of Judicial Conduct, promulgated by the Minnesota Supreme Court, regulates the campaign finance and political activities of judges and judicial candidates. Canon 5 prohibits judges and judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions." Instead, judges and judicial candidates must establish committees to handle all campaign finance matters, including the solicitation of contributions. Canon 5 also prohibits judges and judicial candidates from identifying themselves as members of, from seeking or accepting the endorsement of, and from attending and speaking at gatherings of, political patries. The questions presented are:

1. Whether Minnesota's rule precluding judges and judicial candidates from personally soliciting campaign contributions is inconsistent with the First Amendment to the United States Constitution, or otherwise invalid, insofar as it bars them from (1) signing letters requesting campaign contributions, and (2) making personal appeals for campaign contributions to "large groups" of individuals.

2. Whether Minnesota's restrictions on certain partisan political activities of judges and judicial candidates violate the First Amendment to the United States Constitution, or are otherwise invalid, to the extent that they bar judges and judicial candidates from (1) attending and speaking at political party gatherings, (2) identifying themselves as members of a political party, and (3) seeking, accepting, or using political party endorsements.

Parties to the Proceedings

The following individuals and entities are parties to the proceeding in the court below:

Respondents Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gergory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; were plaintiffs-appellants in the court of appeals;

Petitioner Martha Holton Dimick, in her capacity as Chairperson of the Minnesota Board on Judicial Standards, is the successor to Suzanne White, who was defendant-appellee in the court of appeals and previously Respondent in this Court. Ms. White was the successor to Verna Kelly, who also defendant-appellee in the court of appeals. Petitioner Kenneth L. Jorgensen, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, was defendant-appellee in the court of appeals. Mr. Jorgensen succeeded Edward J. Cleary, who was defendant-appellee in the court of appeals and previously Respondent in this Court. Kent A. Gernander, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Borad, is the successor to Charles E. Lundberg, wo was defendant-appellee in the court of appeal and previously Respondent in this Court.

Corporate Disclosure Statement

In accord with Supreme Court Rule 29.6, Petitioners state that the Young Republican League of Minnesota is a nonprofit corporation, it has no parent corporation, and there is no publically held company owning 10% or more of stock in it. The Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Minnesota College Republicans, Campaign for Justice, Minnesota African American Republican Council and Muslim Republicans are not corporations, but are associations.

Table of Contents

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Constitutional, Statutory, Regulatory Provisions 1

Statement of the Case 1

Reasons for Denying this Petition 2

I. The Decision Below Creates No Conflict in the Circuits or with State Courts of Last Resort 3

  A. There Is No Conflict Created by the Eighth Circuit's Decision on Minnesota's Partisan Identification and Endorsement Provisions 4

  B. There Is No Conflict Created by the Eighth Circuit's Decision on Minnesota's Solicitation Clause 4

  C. Lack of Conflicts of Circuits and Courts of Last Resort Proves the Prematurity of Any Review of the Decision of the Eighth Circuit in this Case 7

II. The Decision Below Presents No Conflict With Prior Decisions of This Court 7

A. The Decision Below Is Fully Consistent With This Court's Decision in *Republican Party of Minnesota v. White* in Striking Down Both Minnesota's Partisan Identification and Endorsement Provisions and Its Solicitation Clause 7

B. The Decision Below Is Fully Consistent With This Court's Decision in *Eu v. San Francisco County Democratic Cent. Comm* 8

III. This Case Does Not Present an Important Federal Question 10

A. There Is No "Confusion" in the Lower Courts That Warrants Clarification by This Court 11

B. The Eighth Circuit Decision Striking Minnesota's Absolute Ban on Personal Solicitation Creates No "Crisis" in the Lower Courts 14

C. The *En Banc* Eighth Circuit Decision Holding Unconstitutional the Minnesota Partisan Identification and Endorsement Provisions Creates No "Crisis" Among the States 15

D. The Decision Below Does Not Subvert State Governmental Structure 17

IV. The Decision Below Properly Balances the First Amendment Rights of Candidates and Citizens Against the State's Interest in Preserving Judicial Impartiality 20

A. The Eighth Circuit Properly Struck Down the Solicitation Clause 20

B. The Eighth Circuit Properly Struck Down the Partisan Identification and Endorsement Clauses 21

Conclusion 25

Table of Authorities

Cases

Alaska Right to Life v. Feldman, 380 F. Supp.2d 1080 (D. Alaska 2005) 12 n.6

Anderson v. Celebrezze, 460 U.S. 780 (1983) 9, 16

Branti v. Kinkel, 455 U.S. 507(1980) 19

Buckley v. Valeo, 424 U.S. 1 (1976) 24 n.11

California Democratic Party v. Lungren, 919 F. Supp. 1397(N.D. Cal. 1996) 22-23

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 22

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 2, 3, 8-11

Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm'n, 388 F.3d 224 (6th Cir. 2004) 11-12 n.6

Family Trust Foundation of Kentucky v. Wolnitzek, 345 F. Supp.2d 672 (E.D. Ky. 2004) 12 n.6

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 22

Independent Republican Party v. Spannaus, 295 N.W.2d 650 (Minn. 1980) 17 n.10

Inquiry Concerning a Judge, Re: Carven D. Angel, 867 So. 2d 379 (Fla. 2004) 14 n.8

In re Angel, 31 Fla. Bar New, No. 23
(July 1, 2004) 12, 14 n.8

In re Dunleavy, 838 A.2d 338 (Me. 2003) 12

In re Kinsey, 842 S. 2d 77 (Fla. 2003) 12, 13, 14

In re Raab, 793 N.E.2d 1287 (N.Y. 2003) 12, 13

In re Watson, 794 N.E.2d 1 (N.Y. 2003) 12, 13

Mississippi Republican Party State Executive Comm. v. Musgrove, No. 3:2CV1578HTW (S.D. Miss.
Oct. 21, 2002) 23

Minnesota Fifth Congressional District Independent Republican Party v. Spannaus, 295 N.W.2d 650
(Minn. 1980) 24 n.11

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 21

North Dakota Family Alliance v. Bader, 361
F. Supp.2d 1021 (D. N.D. 2005) 11, 12

O'Neill v. Coughlan, No. 04 Civ. 1612 (N.D. Ohio
Sept. 14, 2004) 12 n.7

Peterson v. *Stafford*, 490 N.W.2d 418 (Minn. 1992) 16

Republican Party of Minnesota v. White, 536 U.S. 765
(2002) . . . . *passim*

Smith v. Phillips, 2002 U.S. Dist. LEXIS 14913
(W.D. Tex. 2002) 12 n.6

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 9

Tumey v. Ohio, 273 U.S. 510 (1927) 6

U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) 24

Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) 2, 5, 6, 15

Constitution, Statutes, Regulations & Rules

5 U.S.C. § 7323 24

15 U.S.C. §§ 1501, 1502 24

28 U.S.C. § 1254(1) 1

Ark. Code Ann., Cod of Jud. Cond., Canon 5C(2) . . . 14 n.9

California Election Code § 11702 8

California Election Code § 29430 8

Georgia Code of Judicial Conduct Canon 7(B)(2) 5

Minn. Stat. § 10A.27 21

Mo. Rules of Court, Code of Jud. Cond., Canon 5B(2) 14 n.9

Neb. Court Rules & Procedure, Code of Jud. Cond., Canon 5C(2) 14 n.9

N.D. Court Rules, Code of Jud. Cond.,
Canon 5C(2) 14 n.9

S.D. Codified Laws, ch. 12-16, app., Code of Jud.
Cond., Canon 5C(2) 15 n.9

52 Minn. Stat., Code of Judicial Conduct,
Canon 5A(1) 4 n.1, 16

52 Minn. Stat., Code of Judicial Conduct,
Canon 5B(2) . . . . *passim*

Other Authorities

Am. Bar Ass'n, ABA Joint Commission to Evaluate
the Model Code of Judicial Conduct, Final Draft Report
(2004) *available at* http://www.abanet.org/judicialethics/
finaldraftreport.html. 7